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Toward a Community-Based Ethic for Legal Services Practice

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TOWARD A COMMUNITY-BASED ETHIC FOR LEGAL SERVICES PRACTICE

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INTRODUCTION

This Article is concerned with legal services lawyers and how they ethically might allocate their time and resources among their clients. In 1978, Gary Bellow and Jeanne Kettleson assessed the professional responsibility obligations of poverty lawyers practicing within the realm of scarcity.[1] They offered a principled justification for choosing case priorities and case exclusions within legal services offices, even when that activity leads to a denial of service to certain categories of clients because of some characteristic of the clients or their legal problems. The authors evaluated this form of gatekeeping within the normative constructs of the ethical standards of the legal profession—the Model Code of Professional Responsibility at the time—and found the process justified and acceptable.[2] By implication, the authors found the practice justified on more fundamental moral grounds as well. By emphasizing the reform role of public interest practice, and by acknowledging the constraints imposed by scarcity, Bellow and Kettleson concluded that legal services lawyers must make hard choices among their prospective and

* Assistant Clinical Professor of Law, Boston College Law School. Earlier versions of this Article have been presented at the Boston College Law School Colloquium Series, the UCLA-Warwick International Clinical Conference, and the Columbia Law School Clinical Theory Workshop, and I thank the participants at those sessions for their constructive and helpful critique. I also want to thank Alexis Anderson, Steve Ellman, Tom Hefferon, Mark Spiegel, and Ray Wallace for their input and challenge to the ideas I express here. All errors, of course, are mine. Thanks also to Scott Rector for research assistance, and to the members of the Massachusetts Elderly Legal Coalition, whose constant attention to and reflection about client empowerment helped spur these thoughts.

1. Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978).

2. *See id.* at 345–53.

potential clients, and that focusing on certain identifiable injustices or legal needs was a fair, rational, and acceptable way to make those choices—or, as fair, rational, and acceptable as any method available.

At the same time, Bellow and Kettleson addressed the relationship of a legal services lawyer to her individual client whose case has been accepted for representation. Continuing a theme about which each had written a year before,[3] the authors stressed the need for full zeal on behalf of the clients admitted in the door.[4] Criticizing the routinized, bureaucratic nature of legal services practice, they argued that increased commitment to client autonomy, and more zealous representation of client interests, were needed to improve the ethical dimension of this practice. They rejected any model which called for a standard of lawyering for poor persons different from that which governed private lawyering.

This Article will confront some of Bellow's and Kettleson's conclusions from a slightly different perspective.[5] I intend to argue that ordinary, conventional notions of informed consent and zeal do apply differently in the legal services context than in the private market. Whether unfortunate or not, decisionmaking in a legal services context cannot rely on a pure client-centered model. Lawyering decisions which involve resource allocation must be made more often with greater lawyer influence in the legal services context than in the private attorney-client relationship, or at least they must be made with more lawyer-directedness than the client-centered theories of private lawyering profess. Decisions which might in the private sphere be governed by client wishes may in the legal services context be controlled to a larger extent by the lawyer or her institution.

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3. Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Kettleson, *Caseload Control*, 34 NLADA BRIEFCASE 111 (1977).

4. Bellow & Kettleson, *supra* note 1, at 354–62.

5. It appears, from brief conversations I have had with Gary Bellow regarding these issues, that his and (presumably) Jeanne Kettleson's views have evolved substantially since 1978, and that Bellow and Kettleson have come to share the view that rationing care might preclude the full zeal for each client which they advocated at that time. For instance, the Legal Services Institute in Jamaica Plain, Massachusetts, in which both Bellow and Kettleson practice and teach, employs a high volume delivery approach which seeks to maximize the number of clients who may be served. I cannot claim, however, that Bellow and Kettleson agree with my assessment of the quandaries which I investigate here. It is with the greatest respect and appreciation for those authors that I choose to use their earlier statements, which continue to stand for a view of legal services practice which most of the legal profession seems to share, as the basis for my differing viewpoint.

Two overarching considerations compel this conclusion. The first reason for this fundamental difference in professional obligation is that addressed by Bellow and Kettleson—scarcity. Scarcity of time, of resources, of funds, and of political capital alter significantly the practice experience of the public lawyer representing private clients. Scarcity confronts the public lawyer not only at the door,[6] but throughout the practice experience.[7] The second explanation for the differing obligation is the peculiar relationship that exists between a legal services lawyer and her community of clients.[8] The role-driven obligation of poverty lawyers to care for a community of clients restricts the representational choices available on behalf of any individual client. This Article is a preliminary attempt to reconcile professional norms with actual practice within a legal services environment.[9]

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6. For a sophisticated discussion of the dilemmas of legal services intake decisionmaking, see Failinger & May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1 (1984). *See also* sources cited *infra* note 30.

7. Scarcity is inherent in legal services work. It is not, as two sympathetic commentators have argued, "artificially generated since the government could easily decide to allocate sufficient funds to meet the entire estimated need." Failinger & May, *supra* note 6, at 12–13. My disagreement with Failinger and May on this point rests on two grounds. First, I agree with Marshall Breger that the elasticity of legal demand prevents full funding that would eliminate scarcity. *See* Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. REV. 282, 362 (1982). Second, the presence of any fixed budget inevitably creates allocation choices, and without the usual market or price mechanisms some allocation methodology must be used.

8. This Article and the thoughts herein apply to legal services lawyers only. They do not necessarily apply to public interest lawyers practicing outside a legal services setting, nor to *pro bono* lawyers volunteering time and services. Indeed, these thoughts would not apply to a Judicare system that delivers legal services to the poor through private attorneys. The reason for this distinction is that legal services lawyers possess, I argue, a special obligation by virtue of their public funding and mandate to serve an explicit group of poor people. Other well-meaning and politically sympathetic lawyers simply do not share that obligation, and as a result much of what I argue here does not apply to them.

However, the ideas developed here regarding an altered conception of informed consent, *see infra* text accompanying notes 61–65, will have some applicability to those other lawyers who do not charge their clients for their services. In particular, contingent fee lawyers on the civil side and public defenders on the criminal side will need to control access to services—and thus limit informed consent—to compensate for the market forces which otherwise would apply.

9. For a discussion of the growing interest in a medical ethic that is rooted in the actual experience of practitioners, see Veatch, *Clinical Ethics, Applied Ethics and Theory*, in CLINICAL ETHICS: THEORY AND PRACTICE 7 (B. Hoffmaster, B. Freedman & G. Fraser eds. 1989). The need for ethical thought grounded in actual experience is nurtured by the experience of clinical law teaching, from which many of the present ideas have evolved. *Cf.* Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 597–98 (1987).

In an attempt to reconcile the two competing worlds of the legal services lawyer and the private lawyer, I rely on the notion of "triage" as a plausible construct within which to discuss the tensions and angst of legal services practice. By triage I mean a practice of distinguishing among several clients in determining which should receive what level of service, acknowledging that each cannot receive an unlimited delivery of service. A justifiable triage must, of course, be informed by acceptable principles. I suggest that we consider a community-based ethic for legal services practice. Applying such an ethic, a legal services lawyer who is searching for standards by which to choose among competing client demands may evaluate those demands by norms reflecting community interests and needs. Individual client demands that conflict with those norms then may be accorded less weight within the lawyer's allocation strategies.[10]

Part I of this Article describes the institutional terrain of legal services practice and introduces the concept of the lawyer as street-level bureaucrat, operating within a complex, high demand human services bureaucracy. Part II discusses the problems inherent in attempts to ration care within a subsidized law practice. The purpose of Part II is to reveal the practice tensions that establishment professional ethics fail to accommodate, and that form an underlying justification for a discussion of triage principles. Part III then describes a model of community-based ethics that can serve as the basis for a triage system in a beginning attempt to lessen the internal contradictions of poverty law work.

I. THE PHENOMENOLOGY OF PRACTICE: LEGAL SERVICES LAWYERS AS STREET-LEVEL BUREAUCRATS

> As a legal services attorney, you make a lot more decisions about what you are going to do, and what you are not going to do. As a private attorney, you're doing what your clients are paying you

10. As the discussion below will make apparent, I intend by my use here of the "community-based" label to describe a triage approach that is at bottom a principled one. The label "community-based" serves to capture the community-oriented approach generally applied to legal services resource allocation decisions. While it is true that many lawyering decisions in individual cases will not affect explicit community interests in any palpable way, it is important to recognize that *some* principled basis for decision-making, such as avoidance of greater harm, must be applied. *See infra* text accompanying notes 134–137 for elaboration of this point.

> to do. . . . I set priorities and decide who we are going to help, and how.[11]

Legal services lawyers function in many respects as street-level bureaucrats. This term was fashioned by sociologist Martin Lipsky to capture that class of individuals defined as "[p]ublic service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work . . . ."[12] Lipsky was concerned primarily with those relatively low-level public sector employees who, because of the discretionary nature of their job function, wield collectively substantial power, and in effect establish policy for their agency. Lipsky's research focuses on welfare workers, police officers, public school teachers, probation officers, and the like, but he includes in his discussion legal services lawyers as examples of the kind of bureaucrat deserving of this label.[13]

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11. R. Meadow & C. Menkel-Meadow, Personalized Justice in Legal Services: Nonbureaucratic Models of Professional Decision Making 18 (1982) (unpublished manuscript) (quotation of lawyer).

12. M. LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3 (1980).

13. *See, e.g., id.* at 86, 96, 99. At least one author has performed a Lipsky-influenced study of legal services practice. *See* Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1979).

One article has disagreed with Lipsky's inclusion of legal services lawyers as street-level bureaucrats. *See* R. Meadow & C. Menkel-Meadow, *supra* note 11, at 5–7. Meadow and Menkel-Meadow point out that legal services lawyers are not people-processors, are not subject to bureaucratic rules, and are professionals, not low-level line staff. *Id.* These observations are apt ones. Legal services lawyers do not share many of the typical street-level bureaucrat qualities, such as being "generally the lowest ranking nonclerical members of a bureaucracy[,] [t]heir freedom of action . . . strictly defined and encumbered by massive bodies of rules and regulations [with] great numbers of supervisors [to] oversee their work . . . ." Prottas, *The Power of the Street-Level Bureaucrat in Public Service Bureaucracies*, 13 URB. AFF. Q. 285, 289 (1978). In fact, the legal services office itself does not appear to be a "bureaucracy" characterized by "orderly, systematic administrative procedures designed to ensure that work is done efficiently, honestly and fairly." Freidson, *Dominant Professions, Bureaucracy and Client Services*, in HUMAN SERVICE ORGANIZATIONS: A BOOK OF READINGS 428 (Y. Hasenfeld & R. English eds. 1974). Lawyer organizations, including legal services offices, are rather better described by the term *communitas*, which Lisa McIntyre employs in her study of public defenders to capture the spirit of "antistructure," in which hierarchical orderings are tacitly avoided or ill-defined. L. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 121 (1987).

Despite these apparently significant differences, it remains appropriate, and even essential, to critique legal services practice with reference to the street-level bureaucrat theory. Legal services lawyers are unlike other professionals in that their autonomy is constrained substantially by demands of caseload. Street-level bureaucrats, furthermore, are less like traditional bureaucrats because much of their performance is essentially unreviewable; as a result they wield significant power by their exercise of

Legal services lawyers' assumption of the bureaucratic role has subjected them to significant criticism, most notably Gary Bellow's 1977 cutting critique of mass-produced poverty law, *Turning Solutions into Problems: The Legal Aid Experience.*[14] In that piece, Bellow lamented that the neighborhood law office staff tended to typify clients, treating them as mere cases in a routinized, impersonal, and depersonalized practice. Using examples not unfamiliar to legal aid practitioners, Bellow demonstrated how a more energetic, zealous, and thorough lawyering practice could provide a more effective, and more human, service to those clients whom the lawyers had chosen to help. The Bellow and Kettleson article a year later echoed this disenchantment with typification as a method of practice.[15]

Lipsky's valuable insights help explain the behavior that Bellow observes and criticizes. By adopting Lipsky's view of the legal aid office as a street-level organization, we can begin to discern some of the forces at work affecting the practice experience of lawyers and clients alike. A legal services organization is fundamentally a human services organization, and tends to share characteristics typical of that environment. Organizational theorist Yeheskel Hasenfeld, whose descriptions are comparable to those of Lipsky, has focused on the interaction between the political and economic forces that shape a human services organization's structure and processes.[16] Applying what one writer has termed the "political economy perspective"[17] of organizations, Hasenfeld and Lipsky offer several insights that aid an understanding of the neighborhood poverty law practice.

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discretion. *See infra* text accompanying notes 22–23. Lisa McIntyre, among others, has shown how professionals employed in a public service setting are subject to pressures similar to those described by Lipsky in, for example, a welfare department. L. MCINTYRE, *supra*, at 129–35.

14. Bellow, *supra* note 3. Similar complaints about legal aid practice could be heard as early as the mid-1960s. *See* Carlin & Howard, *Legal Representation and Class Justice*, 12 UCLA L. REV. 381, 416–17 (1965) (noting the "unavoidable tendency toward the mass processing of cases" and "perfunctory service").

15. Bellow & Kettleson, *supra* note 1, at 355.

16. *See generally* Y. HASENFELD, HUMAN SERVICE ORGANIZATIONS (1983); Freidson, *supra* note 13. Together with an exhaustive review of research and empirical data gathering on human services agencies, Hasenfeld relies on Lipsky's studies to conclude that one cannot view an organization apart from its political and economic environment.

17. *See* Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1051 (1988) (discussing Hasenfeld's theories).

The first insight is that human services organizations tend to "face turbulent environments characterized by multiple and changing interest groups with different and often incompatible values."[18] These environments are of critical importance to the organization because of the organization's need for legitimation and support. The clients themselves are not a critical focus group since they are fungible, not scarce, and have no exit capability. Clients also tend not to be politically powerful. As is true in criminal defense practice,[19] human services workers often perceive greater gains in nurturing the day-to-day work environment, from which they may seek favors and within which they otherwise must function over the long run, than in working to accomodate the people whom they ostensibly are there to serve.

Studies of legal services practice have demonstrated that this observation applies to neighborhood poverty law practice. The milieu that impacts on the office's functioning, legitimation, credibility and success—such as the local bar, judges and court personnel, welfare offices and social service agencies, political officials, and even the business community[20]—plays a critical role in the policy and values of the office. What Jack Katz has termed "the ethic of reasonableness"[21] among legal services lawyers is a response to these pressures.

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18. Y. HASENFELD, *supra* note 16, at 149.

19. *See, e.g.*, Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1210–24 (1975); Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 20 (1967).

20. Jack Katz has observed that a legal services office "treats the local professional environment as a moral community." J. KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 59 (1982); *see also* M. KESSLER, LEGAL SERVICES FOR THE POOR: A COMPARATIVE AND CONTEMPORARY ANALYSIS OF INTERORGANIZATIONAL POLITICS 23–28, 25 (1987) ("organizational effectiveness depends on the organization's ability to rank all organizations within its network and satisfy the demands of those most important objectively for its continued survival").

21. J. KATZ, *supra* note 20, at 51–56; *see also* Katz, *Lawyers for the Poor in Transition: Involvement, Reform, and the Turnover Problem in the Legal Services Program*, 12 LAW & SOC'Y REV. 275, 294 (1978) [hereinafter Katz, *Lawyers for the Poor*].

One reason for the reliance on the external community is the ambiguity of the goals and technologies of the agency. Human services organizations, according to Hasenfeld and Lipsky, tend to employ technologies which "incorporate many ill-defined tasks and activities." Y. HASENFELD, *supra* note 16, at 149; M. LIPSKY, *supra* note 12, at 40. Agencies find it particularly difficult to rely on "output goals" as a measure of the employees' successful work performance, because measurement of those goals is elusive. Instead, agencies resort at times to "credential" or "prestige" measures of accountability that are intended for evaluation by powerful actors in the agency's environment. Y. HASENFELD, *supra*, at 172–73. *See also* Prottas, *supra* note 13, at 296. A public bureaucracy populated by professionals feels this tension even more strongly. An organization which cannot control directly or concretely the output of its professionals is apt

A second insight drawn from organizational sociology concerns the quality of a street-level bureaucrat's autonomy and discretion. As a result of the inherent ambiguity of goals and technologies of human services work, and the fact that most activity consists of face-to-face interaction between staff and clients, monitoring of staff performance in human services organizations is difficult, and in some instances impossible.[22] This inability to monitor translates into a significant grant of autonomy to the street-level staff, and, consequently, the discretionary power of that staff becomes substantial. Organizational theorists argue that the de facto policy of the agency becomes whatever it is that the line staff does in its exercise of that discretion.[23]

The combination of high ambiguity of role definition, conflicting interests and values, and substantial staff discretion—along with an inevitable excessive work demand because most human services organization "product" is not for sale—invites certain predictable patterns of response by the line staff. The staff will tend to develop methods of control of clients and of workload, and, in a related vein, to adopt a "practice ideology"[24] which "welds observable aspects of the environment into a kind of unity by filling in gaps in knowledge with various projections that ultimately supply a coherent belief system on which action can be based and justified."[25] Clients become typified, classified, and categorized so as to reduce the complexity and ambiguity for the line staff and, as a result, to reduce the workload demands.[26] While the practice ideology is

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to rely instead on ideology, values, or a code of ethics as a method of establishing some influence over the professionals' behavior. Y. HASENFELD, *supra*, at 171.

22. Y. HASENFELD, *supra* note 16, at 121–22. Hasenfeld further offers that such monitoring is difficult because it will be viewed by the line staff as a lack of trust, that it is "obtrusive to the development of positive and empathetic relations between the clients and the staff," and that it raises ethical issues about confidentiality. *Id.*

23. *Cf.* M. LIPSKY, *supra* note 12, at 19; Prottas, *supra* note 13, at 288; Y. HASENFELD, *supra* note 16, at 121.

24. The term "practice ideology" is employed by Hasenfeld, and the phenomenon is described by Lipsky. Y. HASENFELD, *supra* note 16, at 118–20; M. LIPSKY, *supra* note 12, at 140–56. The phenomenon has also been termed "materialized ideology." Sunesson, *Outside the Goal Paradigm: Power and Structured Patterns of Non-Rationality*, 6 ORGANIZATION STUD. 229, 240 (1985).

25. R. RAPOPORT, COMMUNITY AS DOCTOR 269 (1960), *quoted in* Y. HASENFELD, *supra* note 16, at 119.

26. "[S]treet-level bureaucrats must find ways to accommodate the demands placed upon them and confront the reality of resource limitations. They typically do this by routinizing procedures, modifying goals, rationing services, asserting priorities, and limiting or controlling clientele." Weatherly & Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. EDUC. REV. 171, 172 (1977).

largely a staff-developed reaction to the work environment and accompanying demands and pressures, it still is influenced by the organization's articulated values, and by the ethical codes of the workers or their profession.[27]

The description of legal services practice developed by, among others, Gary Bellow, is not very different from what organizational sociology would have predicted for a strained neighborhood office.[28] This is a descriptive account, to be sure, and not a normative one. To assert that the political economy of an institution tends to encourage certain conduct is not to claim moral justification for that conduct. It is important, however, to recognize the contextual limitations and constraints of practice in developing an ethical critique of the conduct and in offering suggestions for change.

Each of the coping mechanisms described by an organizational sociology theory—routinizing procedures, modifying goals, rationing services, asserting priorities, and limiting and controlling clients—not only is familiar to legal services practitioners, but is subject to moral analysis, both in the fact that it occurs and in the manner in which it occurs. I hope to conduct some of that analysis here, focusing on the issue of rationing. The discussion of rationing inevitably will involve, directly or indirectly, all of the other coping responses, for each is in itself a method of rationing or a part of the rationing process. The question of rationing is interesting and dilemmatic because it challenges the central jurisprudential ideals of zealous advocacy and informed consent. The legal services lawyer frequently finds herself in an existential corner: her professional role calls for allegiance to the individual above all, but her institutional role demands that she hold back, make choices, and impose limits.[29] This is the angst of legal services practice.

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27. Y. HASENFELD, *supra* note 16, at 163–71; M. LIPSKY, *supra* note 12, at 189–90; Prottas, *supra* note 13, at 305.

28. *See, e.g.*, M. LIPSKY, *supra* note 12, at 86 (describing workers in strained neighborhood offices as tending to ration services, control clients to reduce uncertainty, husband worker resources, and manage the consequences of routine practice).

29. The angst of legal services practice was captured well by Lipsky:

> This dilemma of street-level bureaucrats is illustrated well by the legal services program. Individually, each attorney is obliged by professional norms to pursue fully the legal recourses available to clients. For impoverished clients this presumably means that attorneys should act on clients' behalf irrespective of cost. Only if this assumption is correct could the provision of legal services begin to redress the balance of power in the legal system, which every observer concedes favors those who command legal resources. But if all clients' legal needs were fully pursued there would be no time for additional clients. The dilemma is exquisite.

Id. at 99.

The following Section focuses explicitly on the rationing question. It first demonstrates that limiting access at the outset is essential but not sufficient to ration care effectively. It then addresses more descriptively the elements of the dilemma producing the legal services angst.

II. RATIONING CARE IN SUBSIDIZED LAW PRACTICE

A. *Gatekeeping: Its Purposes and Its Failings*

The rationing of services performed by legal services lawyers results from a demand for those services that greatly exceeds the supply. Excess demand means principally that all clients cannot be served, and that many clients must be turned away. Choosing between clients is of course difficult, and that process deserves, and has received, significant moral inquiry.[30] One view of this rationing scheme asserts that the hard choices must end with rationing at the door.[31] Under such a scheme, a legal services office accepts only the maximum number of clients who can be served, and served well.[32] Those who are sufficiently fortunate, or deserving, can expect representation as though they were represented by private paid counsel. They can expect comparable zealous advocacy and the same informed consent. To assert differently would be to accept second class justice merely because of the poverty of the client. Scarcity, the argument would contend, harms the turned away, but it does not affect those who get in.

I argue, however, that in reality this model of gatekeeping does not operate to insulate the resulting lawyering from the impact of scarcity. While gatekeeping does separate in broad fashion a group of clients deemed to be worthy from others who will not be served, it cannot work well enough to avoid further scarcity-based decisionmaking by the legal services bureaucracy. In fact, the process by which gatekeeping occurs is one that is, or ought to be, replicated by the bureaucracy as it interacts with its clients on a day-to-day basis. A more complete description of the gatekeeping theory,

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30. *See* D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 306–10 (1988); Bellow & Kettleson, *supra* note 1; Breger, *supra* note 7; Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 J. URB. L. 217 (1969); Smurl, *Eligibility for Legal Aid: Whom to Help When Unable to Help All*, 12 IND. L. REV. 519 (1979).

31. The primary explicit proponents of this position are Bellow and Kettleson, *supra* note 1, at 353.

32. Whether the clients are to be served "adequately," or, as I have termed it, "well," remains a problematic proposition, and one that will be addressed below. *See infra* text accompanying notes 52–59.

touching on its moral implications and its logistical mechanics, is initially necessary to understand this argument.

1. The Justifications and Logistics of Gatekeeping

Choosing clients is a duty of all human services organizations. Legal services offices must engage in a form of triage, or "screening of [clients] to determine their priority for treatment [*i.e.*, representation]."[33] They cannot allocate their services according to the usual method of price, so they must choose other means to decide between potentially eligible clients. As in any triage process, various competing mechanisms are available, including queuing, random selection, amount of legal need, degree of legal need, degree of poverty, likelihood of success or beneficial use of services, age, residence, or social worth.[34] Each of these categories relies on differing moral considerations. For instance, the first two, queuing and the lottery, are egalitarian, while those reflecting degree of legal need or ability to make use of the services arise from utilitarian or efficiency concerns.[35] Every such choice, however, is fundamentally a morally charged one, and can be reviewed according to standards of fairness, justice, and efficiency.

Most programs, and the Legal Services Corporation (LSC) guidelines as well, have rejected egalitarian approaches in favor of those which seek to maximize the benefit of the available resources for the most needy or greatest number of persons served.[36] Most legal services organizations resort to an explicit priority-based method of choosing clients.[37] The LSC regulations require that LSC recipients establish a needs appraisal system that judges the "relative importance" of a prospective client's claim.[38] These regulations do not attempt to inform the meaning of "importance"; it is apparent, though, that an office is expected to distinguish among its clients by deciding *ex ante* that certain problems are more worthy of attention than others, and should be accorded priority. The regula-

33. STEDMAN'S MEDICAL DICTIONARY 1322 (22d ed. 1972) (defining triage), *quoted in* G.R. WINSLOW, TRIAGE AND JUSTICE 1 (1982).

34. G.R. WINSLOW, *supra* note 33, discusses each of these categories and several others in his thorough review of the ethics of triage.

35. *Id.* at 60–109.

36. Bellow & Kettleson, *supra* note 1, at 345–46.

37. *See, e.g.*, NLADA PROJECT ADVISORY GROUP, FUTURE CHALLENGES: A PLANNING DOCUMENT FOR LEGAL SERVICES 9–10, 24–25 (1988).

38. 45 C.F.R. § 1620.2(a)(1), (b)(6) (1989). The regulations express a mandate established by Congress in the Legal Services Corporation Act. *See* 42 U.S.C. § 2996f(a)(2)(C)(i) (1988) ("relative needs of eligible clients").

tions also require that the priority-setting be community-informed,[39] and that the legal services organization when setting priorities consider the nature of the work the office is engaged in generally, with "complement[ary]" issues permitted priority.[40]

The American Bar Association also views legal services as ethically required to adopt a utilitarian standard, and to make the most effective use of limited available resources.[41] Standard 6.1 of the ABA's Standards for Providers of Civil Legal Services to the Poor instructs organizations to "engage in comprehensive planning to establish priorities for the allocation of [their] resources."[42] The Standards refer to the provider's "acute responsibility" to maximize the use of its resources while responding to "most pressing client needs."[43]

The maximization approach appears to be morally justified. The critics of this approach have considerable difficulty articulating a neutral triage principle that even they would accept. Consider, for example, the arguments of Marshall Breger, perhaps the most prominent spokesperson for the egalitarian view in the legal services

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39. 45 C.F.R. § 1620.2(a)(2), (b)(2) (1989).

40. 45 C.F.R. § 1620.2(b)(8) (1989).

41. I employ the term "utilitarian" here to distinguish a vision of maximizing available resources for the most good to the entire universe of potential clients from a vision that relies on access rights, or the principle that each individual possesses an *ex ante* equal right to the available resources. Gerald R. Winslow terms the former vision utilitarian, and the latter egalitarian, and I have followed his usage. *See* G.R. WINSLOW, *supra* note 33, at 22–23.

42. ABA, STANDARDS FOR PROVIDERS OF CIVIL LEGAL SERVICES TO THE POOR Standard 6.1 (1986) [hereinafter ABA STANDARDS].

43. The Commentary to Standard 6.1 states explicitly that concern for the greater good is an appropriate and suggested posture for a legal services provider: "To the extent that its resources are outweighed by demand, a provider should seek to allocate those resources to provide representation which addresses problems which most widely affect its clients. To do so requires some means to identify the legal problems which are most significant to clients." *Id.* at 6.3 (Standard 6.1 commentary).

ABA Formal Opinion 334 confirms the propriety of seeking a maximization approach rather than an egalitarian approach, "to allocate fairly and reasonably the resources of the office and to establish proper priorities in the interest of making maximum legal services available to the indigent . . . ." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974). Opinion 334 expresses this sentiment in the context of discussing when limitation of service on behalf of clients is proper. Interestingly, the sentence quoted adds the following qualifier: "and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility." *Id.* While this language is hardly surprising (the ABA is unlikely to propose conduct inconsistent with its Code), the ultimate result is rather perplexing, for it is not self-evident that limitation of service on behalf of one client in an effort to maximize the resources for use by others is permitted under a strict reading of the Code's zeal and informed consent provisions. For a further discussion of this point, see *infra* text accompanying notes 59–68.

field.[44] Breger is an advocate of access rights, and opposes the kind of gatekeeping schemes which Bellow and Kettleson and the ABA justify. His moral argument is that "a person cannot be rejected as a client because of the comparative social utility of his case."[45] Access to justice, Breger argues, is a fundamental right; a legal services office violates that right by refusing a client service on the basis of nonneutral standards.[46]

Breger argues instead for neutral choices among clients—by lottery, or by waiting list. His discussion of these methods and their obvious inadequacies in a legal services context, however, shows him to be struggling with the efficiency concerns that persuade the utilitarians. Breger agrees, for instance, that emergency cases should be accorded some priority, but he defines urgency in terms of the client's, and not a third party's, assessment of the situation.[47] But absent some objective determinant of urgency, one is left with no triage principle at all. Interestingly, Breger also recognizes, but does not confront, the resource allocation problems that an access theory presents: "If the amount of legal care provided depended on the desires of the client, a tenacious yet irrational client could control a legal aid office's appointment book."[48]

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44. *See generally*, Breger, *supra* note 7; Breger, *Accountability and the Adjudication of the Public Interest*, 8 HARV. J.L. & PUB. POL'Y 349 (1985); Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. REV. 1115 (1982) [hereinafter Breger, *Conflicts of Interest*]. Among the better known proponents of a similar view of egalitarian triage principles is Charles Fried, particularly in his medical writing. *See, e.g.*, C. FRIED, MEDICAL EXPERIMENTATION: PERSONAL INTEGRITY AND SOCIAL POLICY (1974).

45. Breger, *supra* note 7, at 295 (footnote omitted). For a critique of this argument, see, e.g., D. LUBAN, *supra* note 30; Failinger & May, *supra* note 6.

46. In addition to this fundamental objection, he is particularly wary of two aspects of gatekeeping: the authority it confers upon lawyers, who will tend to use that authority in paternalistic fashion, and the risk that unpopular clients and their causes will be closed out of the only possibility they have of obtaining legal representation which, as his premise asserts, is a right fundamental to the political and autonomy needs of those persons. Breger, *supra* note 7, at 321–22, 333–35, 341.

47. *Id.* at 355–56. This argument by Breger is particularly difficult to fathom, and his writing sheds little light on his reasoning. A decisionmaker cannot rely on the expressed sentiments of the client in determining the level of urgency—Breger himself recognizes that a name change might be viewed, reasonably, as less urgent than a landlord-tenant dispute. *Id.* at 355. But if the decisionmaker cannot rely on expressed sentiments, she must have to rely on shared notions of emergency, as Breger seems to concede when he treats a name change as less serious than an eviction. It is difficult, if not impossible, for Breger to recognize an emergency factor without conceding that third-party notions and values will play a part in the hard choices to be made. And, once that concession is made, his thesis crumbles.

48. *Id.* at 357. Breger defines such a client as "irrational," but it is quite rational to seek as much free service as one can obtain, particularly if the need for the service is

An egalitarian or access approach seems plainly wrong in a legal services context. As David Luban has argued, it is particularly difficult morally to justify permitting certain clients to suffer irreparable, serious misfortune while scarce resources are spent on relatively minor matters—lawnmower warranties or overhanging tree disputes.[49] Even Breger appears to agree with this principle,[50] which is generally accepted in medical triage literature as well.[51] That the governing legal services institutions have defined the program's role as maximizing services to benefit the most clients as possible only strengthens this argument.

2. The Weakness of the Gatekeeping Model

If a community-oriented gatekeeping model is justified, as it appears to be, is it an effective means by which to factor scarcity out of the legal services experience? I contend that while gatekeeping is necessary, it is deceptive to treat that process as the only morally charged triage process that the legal services lawyer must face. It is not true that in post-gatekeeping matters a legal services office functions like a private law firm in its interactions with its clients. Bellow and Kettleson nevertheless attempted to make that argument, rejecting scarcity-based decisionmaking within the lawyering practice itself.[52] The authors opposed conditioned or limited representation of clients, arguing that such lawyering contravened established advocacy principles.[53] They viewed deviation from full zeal as "flatly" incompatible with the central values of the profession.[54] Given the requirements of informed consent, zealous advocacy, competence of representation, individual loyalty, and independent professional judgment,[55] the authors argued that less

great. *Cf.* Schuck, *Malpractice Liability and the Rationing of Care*, 59 TEX. L. REV. 1421 (1981); *see also infra* note 128. Since the described behavior is rational and expected, one need not use an extreme example of a single client filling a complete schedule to note that the process will lead to an exhaustion of resources if controls are absent.

49. D. LUBAN, *supra* note 30, at 309.

50. Breger, *supra* note 7, at 355.

51. *See, e.g.*, G.R. WINSLOW, *supra* note 33, at 9–11.

52. Bellow & Kettleson, *supra* note 1, at 355–61.

53. *Id.* at 352–53, 355–57 (other than priority-based restrictions, limiting client choice within representation violates the Code of Professional Responsibility's zeal provision, and fails to honor the client-choice provisions of the Code's Ethical Considerations); *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1), EC 7-7, EC 7-8 (1974) [hereinafter MODEL CODE].

54. Bellow & Kettleson, *supra* note 1, at 355 ("it would be hard to find a set of practices so flatly in violation of [the Code's] provisions.").

55. *Id.* at 353 n.68, 356, 357.

than full representation "is directly prohibited . . . by specific provisions of the Code."[56]

Bellow and Kettleson understood the difficulties inherent in the position they espoused and sought to justify. After the discussion defending full representation, they recognized, with some insight, the ramifications of that vision: "to provide full service to each client would require either a staggering increase in available legal services or acceptance of a state of affairs in which most will go without service in order that a few may get what they need."[57] The authors ended their discussion on that note, and did not begin to question whether in the absence of the "staggering increase" in funding some other representation model might emerge.

If gatekeeping succeeded in removing scarcity from the workday picture, the full representation vision espoused by Bellow and Kettleson might be accepted. Gatekeeping does not succeed in that aim, however, for two distinct reasons. First, even if gatekeeping were to operate well, the conflicts among clients within the poverty law firm are substantially greater than those among clients in a fee-paying client pool. The process of client representation is an elastic one; absent some control on demand, such as billing in the private sphere, the subsidized client will continue to compete with his fellow clients for the scarce time, energy, and funds available to his lawyer. Second, the gatekeeping description that opened this Section[58] is incomplete, failing to account for the phenomenology of legal services practice.

Gatekeeping may make the operation of a legal services office manageable, but it does not resolve, and historically has not resolved, the initial allocation choices that are endemic to street-level bureaucracy practice. Gatekeeping cannot ensure neatly that all chosen clients will receive their fair share of lawyer or staff attention. An intake process is inherently imperfect in its effectiveness—cases accepted often will take substantially more or substantially less time than a predicted estimate. A corollary to this proposition is that the increased predictive accuracy of the process may be obtained only at the expense of its ethical quality. The intake process' reliability can be enhanced only by adopting bureaucratic, routin-

56. *Id.* at 355–56.
57. *Id.* at 362.
58. *See supra* text accompanying notes 30–32.

ized, and nonindividualized methods of practice within the legal services office.[59]

Additionally, while the nature of legal practice is quite elastic, the reality of legal services' existence is that its resources are not at all elastic. Time, energy, personnel, support services, supplies, and, of course, money, are all finite resources. A private law firm, by contrast, retains some options to increase the supply of resources if the demand increases; the individuals making the demands will pay for the increase. While this facile generalization may fail to capture the tensions of work in a very strained and busy private firm, the elasticity and option to expand in the private sphere still does exist, and contrasts fundamentally with the experience of the fixed budget legal services office.[60]

The point underlying this discussion of the weaknesses of the gatekeeping model is that conflicts among clients exist within the legal services office in the same fashion that they exist outside the gate of the legal services office. Legal services lawyers must make choices among their present clients in much the same fashion that they make choices among prospective clients. The next Section will explore some of the value choices a legal services lawyer must confront in allocating resources among clients. After establishing at least two phenomena that limit representation within legal services practice, I will then address one way in which a legal services lawyer might make explicit value judgments in distinguishing among her clients.

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59. The lack of predictability in caseload might lead one to suppose that, at any given time, a legal services office is as apt to be underworked as it is to be overworked. The reason this is not so is that the nature of the practice invites underestimation of the demands of the work. Because great demand is extremely visible and proximate, the ebb and flow of legal practice results in the "ebb" immediately filled with a new client, so that when the "flow" recurs the staff is apt to find itself overcommitted.

Two other factors favor accepting more, rather than less, work. One is the personal discomfort that accompanies a denial of service. Since the line staff, usually the attorneys, makes intake decisions, that staff faces real emotional costs in turning down sympathetic, suffering clients. The second factor is that some cases simply cannot be turned away, even with a well-developed intake system staffed by the most stoic individuals. A public, unlawful, and imminent eviction of an entire building of disabled clients, or a repeat, blatant transgression against a former client for whom the office had obtained relief last year, or an attempt by the welfare department to deny summarily a significant benefit to a large class of recipients—these cases will not be refused, even if the office's caseload is full. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981), discussed *infra* at text accompanying note 182, where the Committee offered the example of an indigent woman facing court-ordered sterilization as a case that, even during a funding crisis when caseload was at capacity, could not be turned away.

60. *See infra* note 66.

B. *Choosing Among Clients Once In the Door: The Nature of Inter-Client Conflicts in Legal Services Practice*

There are two types of limitations felt by legal services lawyers. The first one, division of time and resources among clients, is a pure rationing concern, and it impacts most directly on that element of professional ethics known under the rubric of informed consent. The second type of limitation is divided allegiance between present client wants and future client needs. While this limitation does impact on informed consent, it is better described as a limit on zealous advocacy. Throughout both kinds of examples there is also a running theme of conflict of interest.

1. The Failure of an Informed Consent Model in the Arena of Fixed Resources

Of the two different types of inter-client conflict that I will describe, the most important is also the most common, and the most inherent in practice. Simply put, legal services clients must compete with their peers for scarce agency resources. This competition presents serious difficulties when applying the doctrine of informed consent to legal services clients.

To understand this concern, we must explore briefly the doctrine of informed consent. Its premise is that clients maintain presumptive control over decisions important to their cases.[61] While within the profession there are differing visions of how this doctrine might be implemented,[62] it is fair to conclude that it is centrally established within modern lawyering ethics.[63]

There is, however, an economic view of this doctrine that remains implicit in most informed consent discussions, but that for

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61. *See, e.g.*, Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049, 1056 (1984); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 73–74 (1979).

62. For example, authorities disagree about the allocation of particular decisions between lawyer and client. *Compare* Jones v. Barnes, 463 U.S. 745, 751–54 (1983) (no constitutional decisionmaking right of client in criminal defense context) *with* Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315 (1987) (argument for restricted lawyer autonomy in favor of client decisionmaking).

63. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2.(a) (1983) [hereinafter MODEL RULES]; MODEL CODE, *supra* note 53, EC 7-7; C. WOLFRAM, MODERN LEGAL ETHICS 156 (1986); *see also* Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 815 (1987) ("near universal acceptance of the client-centered model for client counseling").

our purposes must become explicit. Even if clients are presumptively free to choose the direction of their cases, the range of that freedom is constrained by the resources the client brings to the relationship. The client's choice has presumptive validity over the lawyer's choice, but the options available for choosing are often a function of the wealth of the client. Some obvious examples, such as deployment of depositions, expert witnesses, or psychological jury analysts, make the point clear, but it is not such tangible purchases as much as payment for the lawyers' time that is apt to constrain most significantly the usual array of client options. It is a truism that clients who have the ability to pay for their lawyers' time will have at their disposal far greater choices than those who do not.[64]

Informed consent doctrine would posit that clients presumptively control decisions once the range of choices, as determined at least in part by client wealth, has been established. This view of the doctrine treats the lawyer's time as relatively elastic, and in a private market, this is theoretically, though not universally, true. Generic lawyer time is expandable, if only by hiring more lawyers.[65] While the time of a specific or uniquely talented lawyer is not elastic, all this means is that her price might rise accordingly, and the universe of available choices will contract for less wealthy clients.

This view of the informed consent doctrine recognizes a continuum of representation quality (or, perhaps more accurately,

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64. In the field of medicine, which is governed more explicitly by an informed consent doctrine, considerable tension exists within prepaid health plan or HMO practice where, without a fee-for-service delivery system, some constraints must be developed to limit patient demand. *See, e.g.*, L. BROWN, POLITICS AND HEALTH CARE ORGANIZATION: HMOS AS FEDERAL POLICY 158–63 (1983); Hartzema & Christensen, *Nonmedical Factors Associated with the Prescribing Volume Among Family Practitioners in an HMO*, 21 MED. CARE 990 (1983); Pineault, *The Effect of Prepaid Group Practice on Physicians' Utilization Behavior*, 14 MED. CARE 121 (1976). Under third-party payment systems, while rationing remains a macro-economic concern, the role of the physician is often to act as advocate for her patient, to persuade an insurer or peer review organization to cover the procedures the patient wants or needs. *See* Furrow, *The Ethics of Cost-Containment: Bureaucratic Medicine and the Doctor as Patient-Advocate*, 3 NOTRE DAME J.L., ETHICS, & PUB. POL'Y 187, 215 (1988). The physician's role in a pre-paid program is far different, and resembles much more closely the experience of a legal services lawyer who faces an internally fixed budget.

65. Much attention has been paid in recent years to the ethical questions raised by the use of "lawyer temporaries." In general, their use has been sanctioned, with warnings about caring for conflicts of interests, fee-sharing and confidentiality concerns. *See* ABA FORMAL OPINION 88-356; Oliver v. Board of Gov., Ky. Bar Ass'n, 779 S.W.2d 212 (Ky. 1989); Op. 632, N.J. S. Ct. Adv. Comm. on Prof. Ethics (October, 1989). The availability of lawyer "temps" offers one means by which to increase the available time to meet client demands when there are funds to pay for that time.

quantity); under this view, lawyering is a fluid commodity, and resources expended relate to quality of result. In the private sphere, then, informed consent might be described as follows: Clients presumptively choose among options dictated in some substantial part by the client's ability to pay. Clients who wish to pay more may therefore choose to employ greater resources on a certain task, and by doing so they tend to increase, substantially or otherwise, their likelihood of success. Among the resources available to them is a greater investment of lawyer time, which exhibits a theoretical if not actual elasticity within the private market of lawyering.[66]

This doctrine applies less well to legal services practice. In fact, it is fair to say that the presumption of client choice must shift to a presumption of lawyer choice in this realm when the question is availability of options. Without lawyer, or institution, direction of resource allocation among present clients, a queuing system results. The first clients making demands can exhaust the resources, leaving little for the remaining clients.[67] Lawyer direction thus may be justified as a method of protecting client choice over the long run by limiting client choice on a short term basis.

Two examples may assist to make this point. An easy example concerns office finances. The Code of Professional Responsibility permits legal services offices to pay for litigation costs for its indi-

66. This discussion simplifies unfairly a far more complex process. The expansion of private lawyer resources is accomplished with much greater transaction cost than my analogy acknowledges. For one thing, a client who wishes greater effort from his lawyer will seldom achieve that by forcing the law firm to hire more lawyers. For another, the reality of large firm practice, at least, is that the associates' work lives are not unlike those of legal services attorneys—their time is fixed and their workload is excessive. In that context there is little chance to expand the resources beyond the available time of that associate. These points were offered to me, in much more sophisticated depth, by Tom Hefferon.

67. At an earlier presentation of this Article one commentator wondered whether this argument assumes an "ever avaricious" client, and whether that assumption might be unfair. In a similar vein, another listener explained that the greatest difficulty in some legal services practice is engaging clients, rather than having clients demand too many resources. I believe that the former assumption is incorrect, and the latter fact, while perhaps correct in some contexts, is not grounds to believe that the phenomenon of scarcity has less significance.

The theory I adopt does not contemplate avaricious clients. It contemplates rational clients and committed lawyers. Whether clients ask for them or not, a lawyer must decide how to allocate resources among her cases. If asked, clients will prefer fuller representation to less full representation. It is for this reason that the comment regarding client participation is beside the point. The objection is not that lawyers have too few cases but rather that clients seek services and thereafter participate less than one might like. This situation does not alter the phenomenological plight of the lawyer, however—she will still have too little time, only now it is she alone who must decide how to divide that time among her various tasks. *See also infra* note 70.

gent clients.[68] Each office no doubt maintains in its operating budget some litigation account available for the needs of its clients. But, because the client "needs" are both subjective and elastic, an allocation method that relies entirely on client choice would be inefficient and would risk early exhaustion of the fund. Absent some constraint, a client in litigation has considerable incentive to use that money for depositions, expert witnesses, investigators, and scientific testing. Given the size of the fund in a typical office, one fairly contested trial could drain the entire amount. Therefore, lawyers must control most decisionmaking regarding that fund, in the sense that they are responsible for creating the options from which the client will choose.[69] This is, of course, different from how the private market operates. The client who pays will be the creator of the options. The law firm has no reason to refuse client requests based on resource limits if the client is able and willing to create the resources.[70]

Two aspects of this resource allocation process deserve highlight. First, it is apparent that a legal services lawyer must make normative choices among her clients in distributing the scarce funds. While she most often will base her decision on the factor of how well the investment would contribute to the success of the case, she will also no doubt apply the "relative importance" criteria which she uses to screen cases at the door. Cases which would benefit from an investment of resources may not warrant use of the

68. *See* ABA Comm. on Professional Ethics, Formal Op. 259 (1943); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1361 (1976) (interpreting DR 5-103(B)). *See also* MODEL RULES, *supra* note 63, Rule 1.8(e)(2).

69. The standards recommended by the ABA support this conclusion. *See* ABA STANDARDS, *supra* note 42, Standard 2.5 and commentary, at 2.14–2.15. Standard 2.5 suggests that firms allocate litigation and other expense funds based on a merit system or similar principled triage-like process. The Standard uses no explicit language acknowledging clients competing for the scarce resources, but implicitly recognizes that competition. This is the only area within the Standards that the inter-client conflict is recognized.

70. In fairness to private law firms, it is of course true that many real world constraints exist which ought to preclude a client from demanding, say, twenty-five depositions in a small claims case, even if he were willing to pay for it. One obvious concern is the lawyer's time, an item which is addressed immediately below, as well as considerations of fairness to adversaries and professional ethics. But the underlying point remains valid—when the client has non-frivolous requests and the ability to pay for them, those requests will be carried out. In fact, it may violate professional norms for the lawyer to fail to carry them out. *See, e.g.*, MODEL CODE, *supra* note 53, DR 7-101(A)(1) (lawyer shall not fail to seek the lawful objectives of his client through reasonably available means); MODEL RULES, *supra* note 63, Rule 1.2 comment 1 (lawyer bound by client's view of objectives and must consult with client about means, including expense of means).

scarce funds given other needs that exist or are apt to exist. The gatekeeping process thus returns, and is applied to existing clients.[71]

The second point about this process is that the choices made may well be defeasible. A client whose case has been allocated a significant share of the office's funds may learn that those funds must be used for more urgent matters. Given efficiency and maximization goals, a legal services organization must retain some flexibility in its use of resources, including the ability to reassess its commitment of funds in light of changing needs. One problem with the defeasibility concept is that it may violate the contract between lawyer and client. Unless the retainer agreement permits this withdrawal of service, it may constitute a breach of contract to deny a client benefits that have been promised. Additionally, defeasibility may raise moral concerns over breach of trust.[72] This view objects to the abandonment of a client even for reasons which satisfy the maximization and efficiency principles.[73]

Proponents of a "zealous advocacy notwithstanding scarcity" view might argue that the litigation fund example is sui generis. They may point out that the decision regarding how to spend money is simply one more intake process that replicates the original intake process: some clients who need office funds will be served and others will not. Once this new intake decision is made, their argument asserts, the lawyer-client model thereafter differs not at all from the private attorney-client model.

Consideration of a second example will demonstrate that the litigation fund example is not sui generis, but in fact is typical of ongoing inter-client conflicts. Consider the matter of attorney time,

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71. It is likely that clients are not informed of this process, and are not told that funds are available but will not be used because other matters are more worthy. The question of how one accommodates an ethical principle of honesty with a realization of inter-client conflict will be addressed preliminarily in Part III.

It is also possible that a given lawyer will see herself as her client's advocate vis-a-vis her legal services administration for that client's share of the expense budget "pie." In this respect the lawyer will face little ethical dilemma, and will begin to resemble the doctor in a third party payment system who seeks to justify reimbursement. *See* Furrow, *supra* note 64. In this scenario the ethical dilemma remains, but shifts to the office administrator, who must decide whose clients to favor and whose to disfavor.

72. There is moral force to the proposition that one does not withdraw from a promise and break faith with a client because of a perceived need to use the resources better elsewhere. This point has been argued by Charles Fried. Fried, *Rights and Health Care—Beyond Equity and Efficiency*, 293 NEW ENG. J. MED. 241 (1975). Fried's approach to the issue is not universally accepted, however. *See* G.R. WINSLOW, *supra* note 33, at 76.

73. *See infra* text accompanying notes 176–82 (discussing the problem of abandonment).

a commodity that, like funds, is also limited. Client need for and demand for that commodity is just as subjective and elastic. A system that permits client choice regarding use of that commodity, as with money, will tend to employ the resource inefficiently and will benefit early clients at the expense of later clients. Thus, a non-market based system must direct use of its attorney time from above, with a presumption of lawyer direction rather than client direction. The private market model operates on the reverse system: if clients can and will pay for more time, they may make that choice.[74]

Recognition of lawyer time as a commodity controlled by the legal services lawyer presents a serious challenge to an informed consent model because few lawyering options are not dependent upon lawyer time for their availability. The shift of responsibility to the lawyer to allocate her scarce time among her clients leaves the client more powerless than a paying client, and more powerless than recent literature about client-centered lawyering has acknowledged.[75] To be sure, the client retains the choice of those options that the lawyer allots him;[76] but by limiting the choices, much of the true sense of informed consent is lost.

The same two corollaries apply to the time example as to the litigation fund example: 1) the lawyer must allocate her time among her clients on some sort of merit system, replicating among her cases the gatekeeping process which she used in choosing her clients originally; and 2) the lawyer may perceive an allocation choice as somewhat defeasible.

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74. While law firm time is certainly less elastic than is funding for tangible purchases (which by definition is limited only by the client's ability to pay), more lawyer time is often available.

75. Most law school clinical programs teach lawyering skills in the context of poverty law, and use models of lawyer-client interaction that stress client autonomy and empowerment. *See, e.g.*, D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING (1977) (developing a theory of client-centered lawyering); Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 782 n.4. (1987) (approximately 90 law schools have adopted the Binder & Price text).

76. This point is critical and deserves elaboration. To the extent that informed consent means that any choice when made will reflect client values rather than lawyer values, much of informed consent remains intact in legal services practice. If the attorney offers certain options (to use an obvious example, trial versus settlement), nothing said here changes the conventional ethic of client control of the choice between them. The point pressed here is that in legal services practice one of those options (e.g., trial) conceivably might not be available because of the lawyer's decisions regarding how best to allocate her time.

Legal services practice in these respects presents some difficulties when considered in light of conventional professional responsibility principles. Consider the most common counseling task: making a decision between accepting a settlement and proceeding to trial. Both the Model Code[77] and the Model Rules[78] confirm that such a decision is entirely for the client to make. Client-centered decisionmaking theory concurs in that conclusion.[79] In the private sphere, the lawyer's interests in desiring a settlement are often not permitted to enter the decisionmaking calculus; some argue that it is precisely because of that kind of conflict of interest that the doctrine of informed consent applies.[80] In legal services practice, however, adherence to the professional responsibility rule may clash not only with lawyer interests, legitimate or otherwise, but may conflict directly with the needs of the lawyer's remaining clients. The prospect of a week-long trial, chosen by a client for reasons of "principle" after rejecting a settlement offer that meets most of the client's needs, may mean discrete harm to those other clients of the lawyer who will be neglected during that week. The legal services lawyer has a responsibility to address that harm.[81]

My purpose here is to highlight the unique difficulty that scarcity imposes when applying the rules governing professional responsibility.[82] This difficulty contributes to what I have referred to as the angst of legal services practice—that ever-present tension be-

77. MODEL CODE, *supra* note 53, EC 7-7.

78. MODEL RULES, *supra* note 63, Rule 1.2(a).

79. *See, e.g.*, D. BINDER & S. PRICE, *supra* note 75.

80. *See, e.g.*, Spiegel, *supra* note 61, at 87–99.

81. It is also likely that the counseling process by which the lawyer and her client evaluate the trial and settlement options will be affected by the fact that the client's choice to use a large share of office resources will directly impact on other clients. Neutral counseling will be difficult to accomplish in this setting. The counseling process between the lawyer and her client cannot help but be affected by the lawyer's responsibility to consider the legitimate needs of her other clients. Existing professional responsibility rules nevertheless do not permit the lawyer to consider those other needs in this process (except to label them a conflict of interest and withdraw from both representations).

82. Studies in bioethics recognize and have begun to explore the role of scarcity in decisionmaking. Baruch Brody, for instance, has attempted to develop a moral theory on which to base treatment decisions, and particularly decisions about offering life-sustaining medical care. B. BRODY, LIFE AND DEATH DECISION MAKING (1988). In developing his theory of "pluralistic casuistry," *id.* at vi, he makes a critical distinction between access to care in fixed budget contexts and access in fee-for-service settings. *Id.* at 42–48. He denies that the role of the physician in the former context is that of pure allegiance to her patient at all costs; rather, it is to consider, in all decisions, how her actions will affect her other patients. It is this kind of limit on allegiance which we also must consider in the legal services setting.

tween the present needs of immediate clients and the impending needs of the next-in-line.[83] The increased powerlessness that inevitably and by definition follows from the environment of scarcity ought to trouble those who object to the disempowerment that poor and dependent people suffer in the modern bureaucratic state.[84] It is particularly disconcerting to realize—as we must—that the public agency that most seeks to overcome the subordination of clients must operate within a structure that, at some level at least, contributes to that subordination.

2. Individual Client Goals vs. Community Goals

In addition to the inter-client competition created by the environment of absolute scarcity, legal services practice presents another concern: reconciling the interests, needs, and desires of individuals with those of the community of clients that the organization serves. When the individual and the community interests diverge, the lawyer must make choices between those interests.

This concern has several facets. First, it is only a concern if we adopt a utilitarian triage model, rather than a Bregerian access/rights-based model of client selection.[85] The legal services governing authority's[86] adoption of a strategy of maximization of resource use creates a mandate to care about the greater client community. Each program now possesses an ethical duty to employ its resources in a way that best serves that community. Arguably, under an egalitarian model such care would be irrelevant—each client would be seen as atomistic and unaffected by his predecessors.[87] Second, this concern recognizes a sense of community need,

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83. *See supra* note 29.

84. For a glimpse into the rich literature on this subject, see, e.g., Alfieri, *The Antimonies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987–88); Handler, *supra* note 17; Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984); White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990); White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 [hereinafter White, *To Learn and Teach*].

85. *See supra* text accompanying notes 44–51.

86. By this I refer to the LSC and the ABA. *See supra* text accompanying notes 36–43.

87. Under Breger's rights-based theory the conflict that I describe here may still arise, however. Even under a lottery or queue method of intake, the legal services office might well see, again and again, those problems and issues that are most common and most serious to poor persons, such as homelessness and lack of income. The office may find interspersed in that mix some less serious matters, but the access theory would accept that possibility. But if the bulk of cases involves similar issues, and if the office is required by contract or by law to accept those cases, now and in the future, a sense of

or, put differently, it recognizes a community of poor persons whose needs will be similar over time. Third, the concern assumes that legal services lawyers have the ability to recognize and act upon those community needs. This Section will discuss how this concern about the conflict between individual goals and community goals, with its various facets, arises in actual practice.

On occasion, an individual client's case will present issues the resolution of which tend to conflict with the interests of other members of the legal services client community.[88] For example, a lawyer may find herself representing a poor elderly man who has rented out space in his home to a tenant whom he describes as extremely destructive. This lawyer might then find herself obliged by zealous advocacy principles to argue for a restrictive reading of tenant rights, to the same judge before whom she will argue cases in the future on behalf of tenants. If we accept that tenants are a more natural constituency of the legal services office than are landlords, that the office is likely to see tenant problems in the future (or represents other tenants now), and that tenant clients are benefitted by a favorable reading of tenant rights by the courts, then we must recognize that the action in the present case is contrary to the interests of the other constituents of the organization.[89]

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conflict would arise if a present client chose to advocate for a position which would deprive the next dozen clients of substantial rights. Thus, the conflict I describe may exist regardless of the delivery model employed.

88. The "community" to which I refer is that group of individuals who are now, or are apt to become, clients of the legal services office. This definition may well include the general population of poor persons within the geographic confines of the office's jurisdiction, to the extent that the office chooses to focus on "law reform" or "impact" work which would aim to address problems of persons who may never see the office or choose to become clients. In this way the manner in which the office chooses to operate, and its decision about how to allocate its time and resources between individual work and impact work, will affect the makeup of the relevant "community" for purposes of this analysis.

89. This concern is one of "issue conflict" that is felt by private lawyers as well. Traditional ethical authorities have not taken issue conflicts very seriously. *See, e.g.*, Cal. St. Bar Comm. on Professional Responsibility and Conduct, Formal Op. 1989-108 (rejecting notion of positional conflict: to devise a rule that could be applied "uniformly to 'issues conflicts' . . . threatens the ability of attorneys to carry out their roles in the legal system."); O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 GEO. WASH. L. REV. 693, 701 n.32 (1980) (describing positional conflicts as "matter[s] of taste" that are not prohibited); *Cf.* MODEL RULES, *supra* note 63, Rule 1.7 comment 9 (may be improper to make inconsistent arguments in two cases pending at the same time in an appellate court, but permissible in different trial courts).

Legal services lawyers and private lawyers are not in equivalent positions on this matter, however. Legal services lawyers face a much more serious problem in the issues conflict area, for the reasons described in the text. Private lawyers are not mandated to

Perhaps the above scenario is unlikely;[90] it does demonstrate, however, the conflict that exists between the organization "mandate" and the needs of individual clients. Two other examples make the point less starkly, but are more realistic. One is the common practice of legal services lawyers to share case experiences and to decide collectively whether a certain case possesses sufficiently good facts to warrant "taking up" on appeal. A lawyer whose case is at risk to set the wrong precedent will face substantial pressure against an appeal, and her judgment will be affected by that discussion. Or consider a different example: legal services lawyers often are asked to defend low-income housing project tenants accused of serious criminal conduct against proposed evictions. This type of case presents parallel concerns for the legal services lawyer: not only is it likely that most of the tenants at the housing project (some of whom may be existing clients, and some of whom will be or have been clients) believe that such an eviction will be a valuable asset to community life, but it is also likely that the office represents needy families on the waiting list for public housing, and those families will benefit when available units open up.[91] Public housing cases in this respect are even more poignantly problematic than other conflict cases, because in each instance a decision by the legal services lawyer to protect the tenancy of one client is at the same time a choice to deprive another person, who may or may not be an actual

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represent a select constituency, nor is any private lawyer the only lawyer available to any select client. It is precisely that mandate and that exclusivity that makes this conflict more troublesome for legal services advocates.

90. The scenario is unlikely largely because legal services lawyers expressly avoid cases that present this conflict. They are not apt, for example, to represent landlords, even eligible ones.

91. The public housing example is a fairly common example of this dilemma in legal services practice. The tension between tenant and community needs was highlighted dramatically in a difficult, if perhaps procedurally peculiar, class action context arising out of Perez v. Boston Hous. Auth., 379 Mass. 703, 400 N.E.2d 1231 (1980). There, the legal services lawyers from Greater Boston Legal Services (GBLS) had negotiated with the receiver for the housing authority to impose expedited eviction procedures for violent tenants. When a tenant accused of a violent crime challenged the expedited procedure, two separate concerns arose. One was whether the tenant's interests had been adequately represented in the course of the establishment of the expedited procedure through the class represented by GBLS. The Supreme Judicial Court of Massachusetts held that they had not. *See* Spence v. Reeder, 382 Mass. 398, 416 N.E.2d 914 (1981). The second concern was a deep division among the poverty law lawyers about what stance to take in the matter, and whether to represent only the interests of so-called law-abiding tenants. For a fuller discussion of the latter issue, see E.T. Schneiderman, *Perez v. Boston Housing Authority*, Case Study, Materials on the Legal Profession (Harvard Law School, unpublished manuscript (1982)).

client of the organization, of that precise benefit.[92] Welfare benefit victories, by contrast, do not deprive other eligible clients of those benefits.[93]

Each of these examples offers an apparent conflict between the needs of an individual client and the interests of potential clients. Viewed as a gatekeeping issue, these conflicts could be avoided by turning away the conflict at the door. However, these issues can and do arise in the context of a case that already has been allowed inside the "gate." The lawyer who finds herself representing the client when the issue develops faces a distinct choice between her two constituencies. The discussion below advocates a response that would make that choice much more explicit than current practice does,[94] acknowledge directly the validity of future client interests, and call for a somewhat different conception of the traditional conflict of interest and advocacy obligations as a result.[95]

One last tension that deserves to be addressed in this discussion of community-individual interest rapprochement involves representation of groups. Group representation presents problems similar to those outlined above, but with some special features given the common affinity between law reform efforts and group advocacy. If a group hires the legal services organization as counsel in an attempt to encourage its own concrete, identifiable agenda, no unique diffi-

92. "Winning" a public housing eviction case almost always comes at the "expense" of another poor person who would move into that unit. This conclusion is premised on several assumptions. First, public housing is not an entitlement, as are most welfare benefits. Second, most public housing units, I assume, are very scarce and are in high demand, with applicants on long waiting lists. Third, public housing units are valuable. Because a tenant pays far less than market rent, this tenancy is the equivalent of a substantial cash grant to the tenant and his family. Thus, if a legal services lawyer chooses to ensure that one tenant maintains an apartment which otherwise would go to another poor person, the lawyer has used her discretion to provide that substantial cash-equivalent grant to one person rather than another. This perspective does not argue for rejecting public housing evictions as cases, however, because the substantive and procedural protections which legal services advocates have established for public housing tenants are a general good to be shared by all who reside in that housing.

93. It may be true that the welfare case is in fact not very different from the public housing case, despite the entitlement status of the welfare benefits. Any major increase paid out in one entitlement program will inevitably lead to some contraction of benefits in another part of the system, because the whole "macro-pie" is itself fixed. I am indebted to Ray Wallace for this insight.

94. The choice between constituencies may have been quite explicit in the Spence v. Reeder context, *see supra* notes 91–92, but that kind of stark reminder is rare. What is missing from practice is the recognition that virtually all lawyering activity by a legal services lawyer, including rather innocuous individual client work, impacts in some way on other clients.

95. *See infra* text accompanying notes 102–182.

culties arise, and the matter may be treated as if the group were an individual client.[96] If, on the other hand, an advocacy group approaches counsel with the express goal of accomplishing impact or law reform goals, or if a larger group with more diffuse interests and goals seeks representation, ordinary "client veto" principles cannot be applied easily, if they can be applied at all.[97]

It is not unusual for advocacy groups to serve as clients for legal services lawyers.[98] It is also fair to say that the purposes of that representation generally are not to advance the well-being of the advocacy group *qua* group, but instead to serve the interests of its constituency.[99] Lawyers retained by the group to serve the interests of that constituency must discern a model of allocating decisionmaking responsibility. Under these circumstances, it is not self-evident that group-directed decisionmaking must trump lawyer-directed decisionmaking. If the goals of the representation are to benefit a certain class of people, such as poor members of a certain community, or handicapped tenants, there may well be a strongly felt presumption that community groups[100] understand better than, and are more representative of, the desires, values, and interests of the constituency than are the legal services lawyers. In this respect the representation looks not unlike an explicit class action, with the group substituting for the named plaintiff. But, since a group does have its own interests, and more importantly since those who speak for the group may do so for reasons which may or may not include

96. One example might be a collection of tenants from an apartment building which takes concerted action against the landlord in an attempt to obtain repairs or relief from a rent increase. A lawyer would face several traditional conflict of interest matters in this setting, but the fact that the client here is a group does not present any unique legal services conflicts.

97. The distinction between larger groups and smaller, more focused groups forms the basis of Mancur Olson's theories about collective action. *See* M. OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53–65 (1971). Small groups may obtain a collective benefit because each person's stake and role is identifiable; large groups, on the other hand, face far greater problems in this respect. Olson's thesis is that large groups cannot achieve collective good absent coercion or some outside inducements. *Id.* at 44.

98. *See* Breger, *Conflicts of Interest*, *supra* note 44, at 1125.

99. *See* M. OLSON, *supra* note 97, at 111. It might be better to term such an advocacy group a "pressure group," using Mancur Olson's term. *Id.*

100. The term "community group" as a label for a group active within a certain community is common, and seems appropriately and logically descriptive. To the extent that the term implies representative status within that community, however, it may be misplaced at times, and if so the level of deference owed to the group may be diminished accordingly. For instance, certain groups may neither come from nor adequately represent a community, and hence may be a "group" but not correctly a "community group."

a coincidence of interests and values of the group, or of the group's constituency, the presumption of client control in group representation contexts remains a rebuttable one, or should remain so.[101]

Thus, the operation of a client-centered informed consent principle, while limited in legal services practice generally, is even more rebuttable in group impact work. A legal services ethic should accommodate this fact, as well as the other differences described earlier, in its guidance to the professionals practicing in this field.

III. TOWARD A THEORY OF COMMUNITY-BASED ETHICS FOR LEGAL SERVICES PRACTICE

Current professional responsibility authority does not distinguish the role obligations of legal services lawyers from those of private lawyers representing private clients. Except for isolated items such as certain solicitation provisions[102] and greater permission to advance the costs of litigation,[103] the ABA's Model Rules and the previous Model Code do not view poverty lawyers as fundamentally different from private lawyers representing private clients in their responsibilities to their clients. Carrie Menkel-Meadow has written that "one of the foundations of modern legal services practice" is that poverty lawyers should have the same "hired gun" obligations as do attorneys for the powerful.[104]

However, Part II has shown that imposition of private norms on this public, or quasi-public, activity is problematic at best. Legal

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101. This point is made by Charles Wolfram. *See* C. WOLFRAM, *supra* note 63, at 940 (discussing the possible divergence of interests between individuals and larger groups).

102. *See, e.g., In re* Primus, 436 U.S. 412 (1978); MODEL RULES, *supra* note 63, Rule 7.3.

103. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1361 (1976); MODEL RULES, *supra* note 63, Rule 1.8(e)(2).

104. Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29, 39 (1984). This notion is also reflected in the ABA STANDARDS, *supra* note 42. Consider the following quotation from the Introduction to the Standards: "[a]ll lawyers are bound by the ethical standards adopted by the appropriate authority in the jurisdiction in which they practice. . . . These Standards do not impose any different ethical requirements than those already contained in the [Model Code] and [Model Rules]." *Id.* at iv.

Literature on legal services practice reaches the same conclusion. *See, e.g.*, B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR: A COMPARATIVE STUDY OF RECENT DEVELOPMENTS IN LEGAL AID AND IN THE LEGAL PROFESSION 4–10 (1980) (summarizing history); Dooley, *The ABA Model Rules: Why Legal Services Staff and Clients Should Become Involved*, 37 NLADA BRIEFCASE 44 (1980); Erlanger, *Lawyers and Neighborhood Legal Services: Social Background and the Impetus for Reform*, 12 LAW & SOC'Y REV. 253, 255 (1978) (the poor client treated as a wealthy client); Matthews & Weiss, *What Can Be Done: A Neighborhood Lawyer's Credo*, 47 B.U.L. REV.

services lawyers cannot as easily assert the kind of individual zeal that the profession encourages or requires its members to adopt. Whether that individual zeal model is entirely justified in the private context need not be debated here; assuming its validity there, it applies far less well in the legal services context, for the two reasons developed earlier: the inter-client triage process that scarcity imposes; and the unique mission of a neighborhood office to serve its local clientele.

I propose that legal services lawyers be governed within professional ethics contexts by a vision that explicitly includes community norms. While private lawyers may govern their behavior by reference to maximization of individual gain only, legal services lawyers must consider the impact on the office's functioning of the action that the lawyer or the client proposes to take. This proposal is intended to address each of the quandaries which the earlier Sections of this paper described. Resort to community norms helps inform the triage process that individual lawyers must experience in their daily decisionmaking; it offers a standard by which the conflict between individual client goals and potential client interests may begin to be resolved; and it offers the beginning of a theory to accommodate interests within impact work.

First, I outline the underpinnings of the thesis that a client's community is a legitimate interest in the moral calculus which legal services lawyers must employ in their decisionmaking process. I then describe more fully how a community-based model might serve to diminish the tensions inherent in legal services practice. Included in this discussion is the question of how one discerns what those community interests might be. Finally, I begin to address some of the objections to, and problems arising from, this model.

231, 241 (1967) ("Once the attorney-client relationship has attached, the traditional client loyalty must be paramount.").

Not all writers, however, agree that legal services lawyers and private lawyers should be treated alike. While that is the conventional treatment, a minority position argues for a more political role for poverty lawyers. *See, e.g.*, D. LUBAN, *supra* note 30; Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970). *See* authorities cited *supra* note 84. The political role advocated by these authors is somewhat different from the role that I articulate here. The role they advocate (and perhaps I generalize too broadly here) stresses community organization as a basis for true change and for client empowerment. I, on the other hand, while not disagreeing with that argument, seek to craft a role for legal services lawyer *qua* lawyer in the more traditional sense, focusing on immediate legal problems. My stance does not rule out the lawyer as organizer; their stance, however, does not address the scarcity and allocation questions that I believe need to be addressed.

A. *The Underpinnings of a Community-Based Ethic*

In one respect the moral justification for considering community values and interests in legal services decisionmaking arises directly from the triage principles mentioned earlier.[105] By adhering to a utilitarian or maximization approach in deciding whom to serve and the fashion in which they will be served, the legal services providers must consider the broader impact of their work. A choice to serve many, even at the expense of some individual claims, is not terribly controversial from an ethics standpoint.[106]

The developing communitarian ethic provides further justification for this perspective on legal services lawyering.[107] The various

105. *See supra* text accompanying notes 33–51.

106. *See, e.g.*, D. LUBAN, *supra* note 30; Bellow & Kettleson, *supra* note 1.

107. In recent years there has been a revival in communitarianism, "civic republican" thought, and "virtue ethics." In general, it is probably fair to attribute much of the revived interest in community to recent writing by Alisdair MacIntyre in philosophy and Michael Sandel in political theory. *See* A. MACINTYRE, AFTER VIRTUE (2d ed. 1984); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). While using the terms "communitarian ethics" and "communitarianism," I must acknowledge that these phrases are misleading for two reasons. First, I have not dealt with the non-ethical components of these theories. The civic republican debate, for instance, is grounded in political theory. *See, e.g.*, M. SANDEL *supra*; Frug, *Why Neutrality?*, 92 YALE L.J. 1591, 1598 (discussing civic virtue as the basis for political value judgments); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). Second, there is a lack of uniformity within the teachings included under this rubric. Communitarianism has been criticized, for instance, as justifying conservative social development, given its commitment to community spirit as a basis for moral judgment. *See, e.g.*, Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479 (1989) (implicitly connecting communitarian theory to decisions such as Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld Georgia's criminal sodomy statute against constitutional challenge); Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 309 (1985) (challenging Sandel's views of the traditional family and MacIntyre's of patriotism); Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 456 (1987) (criticizing L. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986) for its "civic conception" that all welfare recipients must work for their benefits). At the same time writers sharing communitarian values express substantially left-of-center views. *See, e.g.*, Frug, *supra*; Handler, *supra* note 17, at 1062–74 (summarizing the views of the communitarian philosophers Gadamer, Habermas, Rorty, and Arendt); Nino, *The Communitarian Challenge to Liberal Rights*, 8 LAW & PHIL. 37 (1989).

It is also possible to view feminist theory as falling under the communitarian rubric. *See, e.g.*, C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (theory of moral development that is contextual rather than linear; moral decisionmaking as informed by relationships, in contrast to a traditional individualist approach that focuses on hierarchy of rights). One must take care to avoid unfair generalizations about feminist thought as communitarian, although much feminist writing does share the values of participation and dialogue and supports a contextual perspective in political and ethical judgments. *See* Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to*

voices contributing to communitarian ethics share a vision of personhood as contextual, as obtaining meaning only by reference to the person's environment.[108] They also sound a common theme that ethics cannot be understood outside of the community where the actors live and work, and that to treat ethical questions in isolation from that context is to misunderstand the nature of the inquiry. As Thomas Shaffer writes, "belonging is where morals come from."[109]

There is value in looking to this communitarian movement in developing and critiquing the ethics of legal services work. The communitarian rejection of the liberal atomistic view of individual identity and responsibility supports the critique of legal services practice that Anthony Alfieri has described as "dependent-individualization."[110] Legal services clients are not isolated actors with isolated legal problems; their lives and their problems ought to be viewed in the context of their local neighborhood and their political and economic class. The communitarian view also tends to be less rights-based,[111] and thus offers support for a more collectively oriented triage model. In that same vein it seeks to justify a vision of the good that is not neutral, but allows for and encourages explicit value choices.[112] Among the values that the communitarian movement embraces are those of citizen empowerment, participation, and dialogue, as responses and alternatives to the more formalized and unequal bureaucratic structures that dominate modern political and economic interaction.[113] It thus would favor development of attorney-client relationships that nurture client empowerment, autonomy, and collective action.

For these reasons the developing tradition of a communitarian ethic offers a foundation upon which to craft a legal services ethic,

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Law School", 38 J. LEGAL EDUC. 61, 71–77 (1988) (summary of feminist legal theory); White, *To Learn and Teach*, *supra* note 84. Feminist jurisprudence also tends to be less rights-based. *See* Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1384–88 (1986).

108. For a descriptive account of this developing area, see Handler, *supra* note 17, at 1034–49; Hazard, *Communitarian Ethics and Legal Justification*, 59 U. COLO. L. REV. 721 (1988); Selznick, *supra* note 107.

109. Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703, 717 (1988); *see also* Selznick, *supra* note 107, at 457 (rational action must be "anchored").

110. Alfieri, *supra* note 84, at 684 (relying on Bellow's description of legal services practice); *see* Bellow, *supra* note 3, at 108 n.4.

111. *See, e.g.*, Gutmann, *supra* note 107, at 314–16; Nino, *supra* note 107, at 40–41.

112. *See, e.g.*, A. MACINTYRE, *supra* note 107; Frug, *supra* note 107; Selznick, *Dworkin's Unfinished Task*, 77 CALIF. L. REV. 505, 509 (1989).

113. *See, e.g.*, Handler, *supra* note 17.

an ethic that seeks to confront the political and economic realities of both legal services practice and of poor clients' lives. But in several respects it is risky to view the triage principles offered here as flowing directly from, or as inherently consistent with, the communitarian philosophy. A most basic concern is that the present attempt to craft a legal services ethic accepts as given the institutional character of the legal services office, with its focus on resolving (usually individual) legal disputes within fairly traditional legal forums, in a social and political environment which is decidedly bureaucratic. In other words, the present task is to make some ethical sense of an institution that cannot be, as currently structured and conceived, fully empowering or politically liberating.[114] The present model therefore questions how, if we choose to retain a "liberal" model of poverty law, we can make that model as sensible and responsive to community legal needs as possible. The resulting vision will inevitably fail to resemble a true communitarian one.

In other respects as well, the model offered here is at least partly undeserving of the communitarian label. It is not entirely clear that the definition of community employed in the ethic described here is that which the philosophers would use.[115] The "community" that concerns the lawyer consists of persons of certain income levels, who may or may not interact, live together, or share experiences. Those individuals, in fact, may disagree that they "belong" to that poverty "community."[116] This fact does not present an inherent problem for application of the community-based ethic because, for purposes of legal services work, the clients in fact are a community, in the sense of demonstrating similar needs and interests over time.[117]

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114. The present effort therefore contrasts with proposals such as that of Steven Wexler, Lucie White, William Simon, and Anthony Alfieri, who advocate a more explicitly political, organizing role for poverty lawyers. *See* Alfieri, *supra* note 84; Simon, *supra* note 84; Wexler, *supra* note 104; White, *To Learn and Teach*, *supra* note 84.

115. *See, e.g.*, A. MACINTYRE, *supra* note 107, at 206–07 (concerned with communities, or "settings," which share a tradition and a history); Shaffer, *supra* note 109, at 711 (community ethics developed from "each person's emotional (pre-rational) sense of belonging somewhere, among a particular group of people").

116. *See, e.g.*, Katz, *Caste, Class, and Counsel for the Poor*, 1985 AM. B. FOUND. RES. J. 251, 262–63 (questioning whether the poor may be seen "as members of primordially distinctive groups, or as instances of the caste poor," and criticizing legal aid's attempt to so categorize the poor); Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 596 (1985) (contrasting the poor with groups held together by true bonds, such as trade unionists, ethnic groups, feminists, and environmentalists).

117. *See infra* text accompanying notes 149–162.

Finally, the proposal is more accepting *arguendo* of conventional lawyering tactics than a more radical critique grounded in communitarian principles. The proposal does not necessarily envision any change in the lawyering that a legal services office performs for those clients whose cases, having survived triage, warrant the office's attention. This Article is not about the merits or defects of aggressive lawyering, or lawyering that neglects to consider the interest of the nonpoverty community, with this one possible exception: To the extent that the interests of future clients are placed in jeopardy by aggressive posturing on behalf of one client, those future interests will be deserving of consideration. Thus, what has been criticized as "cooptation"[118] or the "ethic of reasonableness"[119] may well be justified as prudent concern for the office's future clients.

B. *A Community-Based Ethic and the Angst of Poverty Law Practice*

Earlier Sections described the inherent tension in legal services practice between individual client gratification and the lawyer's need to represent her other clients, both present and future, reasonably and adequately. Historically, this tension has been expressed in a debate about how much of an office's resources ought to be dedicated to individual work, and how much to law reform efforts.[120] The discussion above showed that, no matter how one has answered that question, the tension continues to affect each lawyer in her practice as she makes resource allocation decisions, even on her individual cases. Recognition of a community allegiance may offer a way to begin to resolve each of the problems described above: the triaging process, and the individual-community disputes that arise on occasion.[121]

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118. Blumberg, *supra* note 19.

119. Katz, *Lawyers for the Poor*, *supra* note 21, at 294.

120. *See, e.g.*, Bellow & Kettleson, *supra* note 1; Breger, *supra* note 7; Failinger & May, *supra* note 6, at 14–17; Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1076–77.

121. It is not entirely fair to use the word "resolve" here. Even if a legal services ethic explicitly recognizes a community obligation, lawyers will still have to engage in the choosing process. In each such instance, no answer will be self-evident (hence matters will appear unresolved), and the process of favoring one person over another will no doubt be quite distressing. The advantage offered by the community-based model is that it allows open and admitted choices. The present system appears to bury that process.

1. Ethics and Triaging Existing Clients

The first tension of legal services practice described previously is that produced by the need to allocate scarce time and resources among clients who possess little incentive to allocate those goods rationally. The recognition of a community-based triage function for that allocation would offer some principled approach to deciding between and among clients. No such principled approach exists now.

Little descriptive research exists regarding how legal services lawyers in fact ration their scarce time among their clients. The study performed in the early 1980's by Carrie Menkel-Meadow and Robert Meadow offered some preliminary glimpses, but their data on the question here was indirect and impressionistic.[122] The Menkel-Meadow and Meadow study found that lawyers were directed in their work by several forces beyond their own desires or those of their clients. It demonstrated that such external factors as deadlines and judicial pressure were significant.[123] The study noted the absence of any explicit or even implicit triage process.[124] Matters and cases received attention in a haphazard and random way, based not just upon external deadlines but on lawyer predilection and vocal clients.[125] This description of allocation of resources does not seem unusual to those who have spent time in a neighborhood office.[126]

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122. Menkel-Meadow & Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL'Y Q. 237 (1983) [hereinafter Menkel-Meadow & Meadow, *Resource Allocation*]; *see also* R. Meadow & C. Menkel-Meadow, The Origins of Political Commitment: Social Background, Ideology and Work Routines Among Legal Services Attorneys (1982) (unpublished manuscript); R. Meadow & C. Menkel-Meadow, *supra* note 11.

123. *See* Menkel-Meadow & Meadow, *Resource Allocation*, *supra* note 122, at 242; R. Meadow & C. Menkel-Meadow, *supra* note 11, at 15.

124. I am assuming here that the term "triage" will only apply to some attempt to ration care by means of a plan or principle, and that a fully haphazard approach does not qualify as triage. *See* Smith, *Triage: Endgame Realities*, 1 J. CONTEMP. HEALTH L. & POL'Y 143, 145 (1985).

125. The "squeaky wheel gets the oil." Menkel-Meadow & Meadow, *Resource Allocation*, *supra* note 122, at 242.

126. Compare a similar, non-empirical observation by Gary Bellow: "Only if a particular case raises an 'interesting' issue, or the client is unusually attractive or demanding, will any unusual amount of time, effort or planning be expended in providing representation." Bellow, *supra* note 3, at 108. The proposal presented here will validate these kinds of selective preferences, but only if they are principled. If the case is "interesting" because it fits best the community-based goals of the office, that preference is, I argue, ethically warranted.

The community-based model would attempt to impose a value laden structure on lawyer decisionmaking. Triage never supposes a mathematically precise basis for decisionmaking but simply calls for open and honest assessment of the fairest or most principled use of resources at any given time. Not all cases are equally important; the gatekeeping process assumes that as a fundamental premise. Differentiation between ongoing cases based on relative merit could occur much as it does between prospective clients. A case that presents a critical emergency may be preferred over one where the client seeks to vindicate "the principle of the thing." A case that might establish law helpful to other poor persons may be preferred over one that seeks only individual gain. The morality of a client's cause, or of his adversary's posture, may affect the lawyer's decisionmaking.[127]

My use of the word "preference" deserves some explanation. The preference that a lawyer exercises among prospective clients is clear and direct—some become clients, the remainder do not. Among existing clients, the idea of preference is more difficult to grasp. The idea is premised upon a recognition of lawyering as fluid and elastic. While it is possible to represent a client with "minimum adequacy," it is possible to represent that client with far more than that. If the choice about "minimum" versus "full" representation is left to each client, each will presumably choose "full."[128] But the office may not be, indeed cannot be, able to accord all clients full service; it is a fair assumption that only few clients' cases will receive that kind of treatment. This, then, is one view of "preference": all clients receive minimally adequate service, but some receive more.

There is also a more controversial view of preference among clients, with several versions. An organization may find itself faced with a choice where not all clients can receive even minimally adequate service. Similarly, it may determine that certain cases warrant more than minimally adequate service even if that means

127. *Compare* Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (proposal of normative judgments by lawyers about the value of their clients' causes).

128. *Compare* Schuck, *supra* note 48, at 1425:

> One problem [with HMO practice] is that the provider has an incentive to ration, at least to the point that malpractice liability becomes a threat, but the subscriber does not. Indeed, once enrolled, the subscriber faces no constraints on consumption other than whatever queuing costs and physician controls on access may exist.

See also supra notes 67–81.

others will have to receive less than minimally adequate service; perhaps some clients whose cases were accepted will have to be told that their cases must be terminated.

I am prepared to defend both views of preference. The first one needs little defense, for it includes minimal adequacy for all, and is merely descriptive of practice. The proposal I make here need not, but does, seek to justify the second notion of preference as an ethically sound approach to legal services lawyering in appropriately critical times. The justification rests in large part on a view of the *realpolitik* of legal services practice.[129] Any choice of case mix is inevitably imperfect. If a case that is critically important to one or more clients has a small chance of success unless it receives a more than minimal effort, and if that effort is possible only if another client's case, a case which is of less relative importance, is sacrificed, the office should not be forbidden from making the reallocation. This conclusion is justified further if each client is told at the beginning of the relationship that representation is defeasible.

Another approach to the preference issue would be to propose a contextual definition of minimally adequate service for legal services organizations. The definition of minimally competent work is already imprecise;[130] for legal services lawyers, it would be fair to define minimally adequate service as that level of service reasonably adequate to the task in light of competing concerns and the strictures of the legal services budget.[131] Lawyers would then not be

129. *See supra* text accompanying notes 18–29 for a description of *realpolitik* in legal services practice.

130. The accepted definition of malpractice is a lawyer's failure to use "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert. denied*, 368 U.S. 987 (1962). This inquiry compares the accused lawyer to lawyers "similarly situated." Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954); C. WOLFRAM, *supra* note 63, at 211–12.

131. It appears that the malpractice standards applied to a public defender, the criminal equivalent of the civil legal services lawyer, might not take account of the impact of excessive caseload. *See* Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171 (1988) [hereinafter Klein, *Legal Malpractice*]; Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C.L. REV. 531, 538–39 (1988). Klein argues that the "excuse" of too many cases has traditionally been rejected by courts deciding malpractice and attorney discipline cases. *See* Klein, *Legal Malpractice*, *supra*, at 1180, 1190–96.

Even if Klein's conclusions are valid, his focus group can be distinguished from legal services lawyers by the availability of other resources. It ought to be true that public defenders can refuse cases after a certain point, and that their refused clients will be appointed lawyers from among the private bar.

faulted for making good faith triage decisions that resulted in less than adequate representation on occasion.[132]

Adoption of this view of the legal services attorney-client relationship would call for some changes in organizational practice. To begin with, legal services providers would need to be explicit upon first interviewing a client that any case accepted was subject to the office's institutional role as the lawyer of last resort for its entire geographic service area.[133] This warning would minimize, but certainly not eliminate, the moral objection of abandonment if and when a client's representation was limited after the fact.[134] Clients would also learn that no decisions would be made without their full input and collaboration, but that the institution must maintain flexibility regarding the availability of options. While this assurance can be applied literally, in fact in many instances the denial of options is equivalent to committing a client to a position without his consent. If the office cannot expend the resources on the option that the client prefers, and offers only options that the client would turn down if free to choose, then the office can correctly be said to have taken action without full consent of the client. This is perhaps a troubling consideration, but it is frankly a legitimate triage decision, much

132. Some suggestions have been made in the field of medicine that standards of care ought to account for the cost controls imposed by federal Medicare and similar standards. *See, e.g.*, Blumstein, *Rationing Medical Resources: A Constitutional, Legal, and Policy Analysis*, 59 TEX. L. REV. 1345, 1397 (1981); Morriem, *Cost Containment and the Standard of Medical Care*, 75 CALIF. L. REV. 1719 (1987) (availabiity of funding must be considered in evaluating the reasonableness of physician or hospital action); Schuck, *supra* note 48, at 1425; *cf.* Note, *Rethinking Medical Malpractice Law in Light of Medicare Cost-Cutting*, 98 HARV. L. REV. 1004, 1017–19 (1985) (ultimately rejecting suggestion as unfair to the poor).

133. That a legal services office is literally the "last lawyer in town" reinforces the moral obligation to be as available as reasonably possible to new clients. Many have argued that being the "last lawyer in town" creates responsibilities which might not be present but for that fact. *See, e.g.*, M. DAVIS & F. ELLISTON, ETHICS AND THE LEGAL PROFESSION 428–64 (1986) (debate between Michael Bayles and Michael Davis on refusing clients when no other lawyer is available); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1079 (1976); Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 562–63. Marshall Breger has argued against the conclusion offered here based on the "last lawyer in town" phenomenon. He posits that being the "last lawyer in town" makes it more imperative that legal services lawyers not turn away clients based on the nature of their legal problem, when those clients have no other alternative. *See* Breger, *Conflicts of Interest*, *supra* note 44, at 1122–27.

134. *See infra* text accompanying notes 176–181 for a discussion of the abandonment concept.

like the decision health care providers make in providing scarce medical attention to some patients but not others.[135]

At a time of great office overload the lawyer's choice to focus on certain cases in lieu of others must be an informed, not a random, choice. The community-based model implies that triage principles will be developed from community norms; decisions about relative importance will be informed by values, interests, and needs shared by the office's poor clientele. The use of community-based norms is most apparent in those cases where a lawyer must decide whether or not to accept a client whose case may interfere with the development of law favorable to low-income clients.[136] A case that furthers tenant rights should be preferred over one that risks establishment of harmful precedent.[137] The community-based view may also be applicable, if perhaps less directly, to those cases that seem unrelated to broad community issues—for example, an ordinary divorce or consumer dispute. If a case is to be compared to other cases vying for attention, the community norms will be important in determining which of the several cases, if any, is more likely to further the interests of clients generally. In making her choices, the lawyer should be required to consider those community norms. That one client's matter seems more congruent with broader office goals and interests does not end the analysis, though. The collective concern cannot be taken as a trump in the analysis but must be a seriously considered factor.

Finally, in most legal services work the choice will be between cases which affect the community of interests in no direct, broad, or significant way at all. In these triage instances the principles governing ethic will not be as apparently community-based as in the instances discussed above, but it still needs to be principled, and the principles supporting an office's triage system should reflect norms of its mission, rather than norms or preferences that are personal to the lawyer.

2. Ethics and Individual-Community Conflict

The triage considerations just described are different in some respects from the considerations resulting from the second tension

135. *See* G.R. WINSLOW, *supra* note 33, at 24–38 (discussion of examples of medical triage).

136. *See supra* text accompanying notes 88–89 for a discussion of these cases.

137. This example is spelled out more fully above. *See supra* text accompanying notes 88–89. *See also infra* note 163 for a reference to authorities which debate whether advocacy for tenant rights in fact helps tenants.

that this piece has concerned itself, that of individual-community conflicts. In these latter quandaries the dilemma may not be the result of a lack of available resources to accomplish what the client and his case deserves. Instead, the dilemma is that by accomplishing that result the office may be sacrificing its own principles, and undercutting future clients' interests. Here, too, an adoption of an explicit community obligation would present a more coherent approach for these cases than does existing doctrine.

When faced with a case which might create "bad law," a legal services lawyer, under conventional principles, must either withdraw, if the difficulty is such that the lawyer's independent judgment is impaired, or proceed with energetic advocacy. Current doctrine thus permits a lawyer the choice of declining to proceed with the case, but, because legal services clients have no access to replacement counsel, this kind of refusal of service is unpalatable. If the matter is in litigation, a court is unlikely to permit withdrawal or acknowledge a conflict of interest if no existing client faces any concrete detriment.[138] The community-based model proposed here would change the lawyer's perspective in this kind of case. In conversations with her client, a judge, or herself, the lawyer would be permitted to assert the legitimate interests of unnamed but future clients in her attempt to refrain from proceeding further on the issues that present the problem. As in the triage situation, this fact may not mean that she will not go forward, but it ought to be an element that the lawyer, her client, and a judge hearing a motion to withdraw, should consider in the path to a decision.

The most reasonable course for the legal services organization to take in this scenario would be to permit the lawyer to remain on the case, with client consent, but with dispensation not to argue or raise the issues that present risk of harming other institutional interests. This proposal looks to both a stricter and a more liberal view of conflicts of interest: stricter regarding positional conflicts, and more liberal regarding continued representation notwithstanding the stricter issues conflict. The justification for the former is readily apparent: once we accept larger community concerns as possessing increased legitimacy, the issues conflict increases in importance.[139]

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138. Positional conflicts generally are not treated as serious, disqualifying conflicts of interest. *See supra* text accompanying notes 88–89 for a review of the professional opinion regarding positional conflicts.

139. It seems consistent, then, that Marshall Breger, the "access rights" spokesperson whose writings disagree explicitly with use of legal aid resources to achieve any collective, broad-based agenda for the poor, would argue that positional conflicts should

The justification for the latter is to avoid the prospect of no representation for those clients whose cases present the positional conflict, as traditional conflicts doctrine would do.[140] If the client consents,[141] and if limited, somewhat hobbled representation rather than no representation at all would provide some benefit, then little reason exists to deprive a willing client of whatever the office can offer consistent with its greater mandate.[142]

3. Ethics and Group Representation

The community-based model is of some use also in addressing the informed consent questions that arise in group representation.[143] The problem here concerns the limits of deference to client groups in directing a broad law reform agenda. Conventional client-centered theory would give great deference to group direction based on the traditional informed consent rationale. It is easy to adopt a syllogistic approach: the group is the lawyer's client, re-

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not serve as a basis for legal services intake or representation decisions. *See* Breger, *Conflicts of Interest*, *supra* note 44, at 1134–35.

140. At least one commentator has expressed support for a differing view of conflicts of interest when the lawyer has public interest values at stake. *See* Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1461–69 (1981) (relaxing fiduciary obligations in test case litigation may be justified on public policy grounds).

141. Clients will likely consent because they have no other choice. While this "consent" has been characterized as illusory, and no consent at all, *see* Bellow & Kettleson, *supra* note 1, at 358, we cannot remedy the injustice of poor peoples' limited options with a response which offers unlimited options to those who access the system first.

142. Of course, if non-hobbled representation is available, then every reason exists to allow the legal services office to opt out and for the separate counsel to opt in. This remedy was followed in the *Reeder* litigation, where Greater Boston Legal Services found itself as counsel for a party who wished to challenge an eviction procedure which GBLS had helped effectuate. *See* Spence v. Reeder, 382 Mass. 398, 416 N.E.2d 914 (1981); *see also supra* note 91. But to see this as a remedy in each case is risky and inappropriately sanguine. *Compare* Breger, *Conflicts of Interest*, *supra* note 44, at 1150–60 (legal aid conflicts may be remedied by resort to other voluntary counsel). Two facts warrant this conclusion. First, if availablity of private, free counsel were plentiful, then much of the access concern which this Article addresses would be diminished in importance. Access concerns, however, are serious, and private, voluntary efforts have been disappointing in their attempt to satisfy the overwhelming need. *See, e.g.*, C. WOLFRAM, *supra* note 63, at 938 (1980 study showed only one-eighth of needs of poor persons met by legal services); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 699 (1981) (*pro bono* efforts have failed miserably to compensate for the inadequacies of legal services funding). Since the voluntary pool will be unavailable, the resulting ethical problem needs to be addressed. Second, as long as the voluntary pool is filled, as it most likely will be, resort to that pool means displacement of other clients. The choice among clients will therefore be transferred from the legal services office to the voluntary pool.

143. *See supra* text accompanying notes 96–101.

tained by that client for the client's purposes; clients decide for themselves what their goals and objectives should be; hence, absent unethical, illegal, or similar "off the table" requests, group decision-making governs.[144]

This syllogism loses some of its force if through legal representation the group looks to achieve a goal broader than one that impacts only on the group's immediate members. I suspect that this broader purpose is present in the vast majority of group, and particularly large group, representation.[145] The benefit of recognition of a community obligation of legal services lawyers is that lawyers may then have permission to test the adequacy of the group agenda and compare it to the lawyers' perception of the interests of the group's constituency. Such comparisons are necessary, if only because the client group and its leadership might possess their own institutional needs that may not be entirely congruent with the interests of the protectorate.[146]

There is an argument that the conventional view of lawyering need hardly be changed to permit the comparisons suggested here. Lawyers already, even under conventional analysis, are less bound by client direction when the client is an organization.[147] While there is some merit to that argument, it is not entirely persuasive. First, even if we agree that *all* lawyers representing groups warrant this broader vision of representation, this principle needs special emphasis for legal services practice because of its obligation to other poor persons who might be affected by the group's goals. Second,

144. This argument may be taken a step further: What the group desires is determined by the group's processes; if the group chooses spokespersons to represent the group's view, the lawyer accepts that articulated view. *See* Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971), *reprinted in* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 607, 612 (2d ed. 1984) (in public interest practice client's view controls unless "capricious").

145. *See* M. OLSON, *supra* note 97, at 50–51.

146. It is not at all controversial to note that groups are not perfectly representative organizations. A group of activist citizens is not necessarily a flawless advovate for the broader community for which it is advocating. For an insightful description of this latter point, see Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (noting differing conceptions of the African-American community's desires and interests in the struggle to improve educational opportunities for their children); *see also* Failinger & May, *supra* note 6, at 17 (community groups "will consistently look to many of their own subjective factors" in decisionmaking).

147. For example, the ethical standards developed to govern lawyers representing private organizations such as corporations stress the obligation of the lawyer to look beyond the desires of the constituent who represents the organization. MODEL RULES, *supra* note 63, Rule 1.13 and comment.

the conventional group representation caveats are insufficient in the legal services context. For example, Model Rule 1.13 cautions that lawyers may not necessarily assume that an organization's spokesperson accurately represents the organization's interests. If a serious question about the accuracy or good faith of that representation exists, the lawyer may seek out other constituents to help discern organizational direction. The lawyer may not, however, disagree with the organization's definition of its role or purpose, absent concern about illegality or fraud. The legal services' mandate suggests a different approach. Because of the community orientation of the poverty lawyer, she may challenge the substance of her client's goals, not just whether the spokesperson has articulated those goals correctly.[148]

4. The Benefit of an Explicit Community-Based Norm

It may well be true that the kinds of triage and community-based decisionmaking discussed here occur in fact in legal services practice, as lawyers in good faith seek to make the most of the limited goods at their disposal. Even if that is so, adopting an explicit community-based approach has several advantages. First, honestly recognizing a description of practice is always beneficial. Acknowledging that all clients cannot be served in unlimited fashion is preferable to pretending that such unlimited service is being offered. And, once limitation is acknowledged, adopting a principled approach to imposition of limits is preferable to an unfettered or unprincipled approach. If, in fact, legal services lawyers act more on good faith community-based principles than on personal idiosyncracy, that propensity should be documented, and encouraged by adoption of an explicit principle. If on the other hand legal services lawyers act most often on more random or arbitrary factors, surely the profession would wish to encourage a principled mode of decisionmaking by including such a model in its published norms.

A second reason for making the community-based triage process an explicit professional obligation of legal services lawyers is to

148. *See, e.g.*, D. LUBAN, *supra* note 30, at 347–57 (defending concern for "future generations" in civil rights advocacy, even perhaps at the expense of present generation). David Luban's view of this special role has been criticized by at least one sympathetic commentator. *See* Ellmann, *Lawyering for Justice in a Flawed Democracy* (Book Review of LAWYERS AND JUSTICE), 90 COLUM. L. REV. 116, 174–89 (1990). Ellmann is skeptical of Luban's attempt to justify manipulation of individual clients for the benefit of the greater good of a class of clients. *See also* Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Ellmann, *Manipulation by Client and Context: A Response to Professor Morris*, 34 UCLA L. REV. 1003 (1987).

encourage reflection both among lawyers, and between lawyers and clients, about how best to inform that community-based discretion. As long as the resource allocation process among clients remains implicit or random, improvement in that process, and debate about its contours and the values that it expresses, remains less likely.

C. *Determining Community Interests*

The community-based model can succeed only if the idea of community interests or community values has some identifiable substance. If legal services lawyers in their decisionmaking must take account of the interests of their clients as a class, how do they inform that process?

On one level, this question is neither as difficult nor as novel as it might appear. Legal services organizations make community-based decisions every day when they decide which clients to serve and which to turn away. The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants recommends that neighborhood offices use the interests of their clients as a whole in allocating their services among prospective clients.[149] These guidelines, while not spelling out a detailed process except to require community member participation, assume that professionals working with a low-income community can recognize adequately the needs and critical desires of that population, and make intake decisions accordingly. The community-based model of lawyering proposed here merely takes that process one step further and applies it inside the office.

The "community" with which we are concerned in this discussion is best defined as the geographical community for which, and to whom, a neighborhood office is responsible, and more specifically the poor clients who reside there. The "interests" of that group of persons probably will be characterized with reference to a somewhat "democratic" approach; the concerns of the greatest number of clients will likely be paramount in importance.[150] I must emphasize, though, that this idea is not self-evident. A different, less "democratic" agenda could also be justified.[151]

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149. ABA STANDARDS, *supra* note 42, at 2.2. For examples of concurring policies, see, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974), and the Legal Services Corporation statute, 42 U.S.C. § 2996f(a)(2)(C)(i) (1988).

150. *See* Ehrlich, *Legal Services for Poor People*, 30 CATH. U.L. REV. 483, 490–92 (1981) (poor members of community have common interests in changing laws).

151. An example should make this point clear. Hypothesize a community whose low-income residents can be polled with some accuracy. Assume further that the majority of "voters" choose domestic relations and consumer protection as the areas where

To say, as I have, that one determines community interests in the usual fashion masks a more important debate which deserves at least brief consideration. The debate revolves around the appropriate role of lawyer discretion in informing the community-based decisionmaking process. One approach to this problem relies on lawyer good faith to discern needs and interests, as learned from advisory participation of community residents as well as from the lawyer's own experience in representing clients. A contrasting approach defers to the community more directly in the decisionmaking—it might suggest the actual review of decisions by an "ethics committee" consisting of members of the community. The first relies more heavily on lawyer discretion, and is less bureaucratic; the second restricts discretion, and is somewhat more bureaucratic, but increases community participation. It may appear ironic to equate an increased bureaucracy with increased client participation, for much organizational critique correctly views bureaucracy as generally unfriendly to client participation.[152] These contrasting approaches, however, do indicate that client participation is increased through the more bureaucratic method. This may be partly illusory, as we shall see, but it is also partly true.

I see tentative reasons to support the discretionary approach rather than what I shall refer to as the "ethics committee" ap-

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legal representation is most critically needed. Such a result would not be totally unexpected, perhaps because many have personal experiences of needing assistance in those areas. Assume further that the lawyers working in the legal services office see a reasonable amount of those cases in their practice, but see far more welfare and housing cases, and from their perspective these latter two areas tend to be more "urgent," in that the risks to which an adverse result will expose the victims in the latter cases are more severe and irreparable. It is not unreasonable to propose that the limited resources of the office be allocated to the welfare and housing areas, notwithstanding the "vote." *Compare* Comment, *supra* note 120, at 1126 (community chose to focus on domestic relations work, contrary to the judgment of the staff; staff felt bound by the judgment of the community representatives).

A principled distinction may be drawn between a plebescite of low-income residents generally and an assessment of the needs of those who actually seek to use the office's services. To the extent those assessments differ, there is some wisdom in affording greater weight to the actual clients in need. But that distinction may not end the matter. It may be true that many more persons seek assistance on domestic and consumer problems than on housing and welfare problems. If this is the case, a policy that favors the latter cases must be justified on the triage principle of serving more urgent cases before less urgent cases. Good faith defenses can be made of both the democratic method and of the triage method and it is not my purpose here to determine which approach is more consonant with the values represented by the legal services philosophy.

152. *See, e.g.*, Handler, *supra* note 17, at 1058–59.

proach.[153] The discretionary approach may be more compatible with the role legal services lawyers traditionally have assumed within their community, and may also present a more effective and meaningful way to gauge critical community sentiment.

Current practice relies upon a discretionary approach in the establishment of office priorities. Legal services organizations must seek "maximum feasible participation" by members of their client community in office operations policies.[154] Such participation usually is achieved by the use of an advisory board of citizens who care about and are familiar with the plight of the poor in their community. However, the impact of such boards on the office operation is partial at best.[155] While it is essential that office staff hear from members of the neighborhoods to be served, it is not self-evident that the direction offered by those members will or even should trump the direction that the office staff members might elect based on the crises and emergencies that they see in their work. In fact, legal services offices usually delegate substantial responsibility for priority setting to the lawyers, because any chosen method of eliciting community input runs the risk of failing to represent community needs accurately.[156]

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153. For the views of two writers who advocate resort to discretionary rather than rules-based models of agency decisionmaking, see Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270 (1983); Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

154. *See* H. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF THE LAW 20, 26 (1975); *supra* notes 36–40 and accompanying text.

155. The Menkel-Meadow and Meadow study, *see* sources cited *supra* note 122, demonstrated that case priority categories that were suggested by the community members or advisory boards did not reflect the priorities felt by the attorneys actually making day-to-day decisions. Menkel-Meadow & Meadow, *Resource Allocation*, *supra* note 122, at 247–51.

156. The question is not whether to elicit community input, but whether to delegate final decisionmaking authority away from the office. To delegate to a random individual community member presents obvious problems of representativeness. To delegate to a prominent community group seems to lessen the representativeness concern, but, as Professor Wolfram has written:

> [A]ny group that can be assembled for meaningful consultation will be representative of the larger group—the poor who will be affected by a decision—only to some unknowable and imperfect degree. . . . In the nature of things, there is probably no better way of achieving effective law reform, if indeed that can be achieved through the legal process, than by permitting legal service and other public interest lawyers to make critical decisions themselves.

C. WOLFRAM, *supra* note 63, at 940–41. *See also* B. GARTH, *supra* note 104, at 213 ("Community control tends to become control of the community by some elements to the exclusion of others and does not necessarily lead to more effective service.") (quoting N. GILBERT & H. SPECHT, DIMENSIONS OF SOCIAL WELFARE POLICY 117 (1974)).

The vision and perceptions of the legal services staff are affected both by its institutional role and its working environment. As described earlier, these street-level bureaucrats are not immune to the judgments of the local bar, courts, agencies, and other relevant actors.[157] Their decisions will be affected by these forces.[158] In light of these varying sources of input, legal services policymaking contemplates a sharing by lawyers and community members of visions, in which each segment acknowledges its need for the other's perspective. Ultimately, however, the actual decisionmaker, the lawyer, will be asked to exercise discretion based on that shared experience to use resources in ways that best meet the perceived needs of the clients.

This mode of discerning the community interests provides even greater justification for the internal decisionmaking system proposed here. A more active and directive community role in the kind of triage decisionmaking described above is attractive, but it ultimately remains too problematic. An ethics committee approach is attractive because it creates an opportunity for increased empowerment of clients or community members; such empowerment is, or ought to be, a significant goal of poverty law practice. Any benefit in community empowerment, though, is offset by its interference with individual attorney-client relationships. This disadvantage arises from the fundamentally bureaucratic nature of the ethics committee model.

That the community-directive approach should be more bureaucratic is not self-evident, particularly if bureaucracy is contrasted with a loosely coupled, discretion-based model.[159] It might seem that this approach merely shifts the discretion away from the lawyer and toward a panel of activist community members, whose decisionmaking would be bound less by rules than by good faith judgment, which is antithetical to the notion of "bureaucracy." To

157. *See supra* text accompanying notes 18–21.

158. While influence by outside forces might be seen as nefarious, given the conflict of interest that results when a lawyer's allegiance to her client is compromised by her previous commitments to such forces, the analysis here would offer a different view. While it is beyond dispute that sacrificing clients for, say, personal career advancement is unjustifiable, it should not be unjustifiable for a legal services lawyer to consider, in her decisionmaking, the needs of her office for good faith relationships with relevant actors in the future. Consider, for instance, a lawyer who believed that aggressive posturing on behalf of one client against a local housing authority would damage relations with that agency and jeopardize negotiations with the housing authority on behalf of future clients. The lawyer would harm her future clients if she proceeded on behalf of the present client, and it would be wrong to ignore that future harm.

159. For a discussion of that phenomenon, see Handler, *supra* note 17.

this extent the contrasting approaches might be seen as bureaucratically equivalent, and different only in the perceived or likely accuracy of expected results.[160] But there are two bureaucratic concerns that warrant attention. First, use of a mandatory ethics committee invites guidelines about when its use is required, which introduces a rules-based system into the model. Absent such rules, the result is identical to the discretionary approach. Second, the use of an outside panel discourages dialogue between lawyer and client. One of the benefits of recognizing a community obligation in legal services practice is to make explicit a triage process which now is implicit. A part of that benefit is increased conversation with clients about the reasons for limiting service. Reliance on an outside panel not only deprives the lawyer of the moral accountability that should accompany her decisionmaking, but deprives the client of the immediate ability to confront the lawyer, as a respected participant in his case.[161] To this extent the increased empowerment of community members on the panel is at the expense of some empowerment of the individual client.

Acceptance of a community-based model for legal services practice would require that these decisionmaking issues be accorded much more thought. Besides the question of the identity of the entity or person deciding community interest, there is another, in some ways even more thorny, issue that would need to be resolved, not by the profession, perhaps, but by individual lawyers facing actual decisions. The question is whether vigorous assertion of individual rights for poor persons has generally tended to help or harm poor persons. To use a rather common example, some have argued that aggressive litigation of tenant rights has diminished the stock of affordable, low-income housing by raising the cost of owning and investing in such property.[162] When individual lawyers, or lawyers

160. In other words, if the discretionary approach and the ethics committee approach are bureaucratically equivalent, one could choose between them by ascertaining which would best read community sentiment. While I argue that even on this score the ethics committee model fares less well, *see supra* note 151, it is also true that the two approaches are not bureaucratically equivalent.

161. The importance of conversation in the professional-client relationship has been addressed in many contexts. *See, e.g.*, R. BURT, TAKING CARE OF STRANGERS, THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS (1979) (medicine); J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984) (medicine); T. SHAFFER & J. ELKINS, LEGAL INTERVIEWING AND COUNSELING (2d ed. 1987) (lawyers); Handler, *supra* note 17 (lawyers).

162. For a view of both sides of this debate, see, e.g., R. POSNER, ECONOMIC ANALYSIS OF LAW 259–62 (1972); Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80

and community members, disagree about this kind of economic and sociological analysis, the lawyer's obligation to consider the impact of her actions on other poor clients may be quite difficult to conceive.

D. *Possible Objections to the Model*

Thus far this article has offered a critique and proposal that consists of three parts: 1) a recognition that a client-centered view of informed consent cannot apply to legal services practice; 2) a recognition that triage principles must apply not only to gatekeeping decisions but to day-to-day decisionmaking within the legal services setting; and 3) a proposal that legal services lawyers be governed by an explicit concern for the interests of their community of clients. To the extent that this model of community-based ethics changes the relationship between attorney and client from that which the private, individual zeal model might describe, the model is subject to a number of objections. This Part of the Article will address three of the more serious potential arguments against the model.

1. Increased Lawyer Power

The fear of increased lawyer power seems to be the most fundamental objection to the model I have proposed, but perhaps the one to which I might respond most readily. Two concerns arise here. First, increased lawyer discretion is troublesome, some will argue. Second, the institutional environment of legal services practice prevents lawyers from engaging in truly principled, group-centered decisionmaking. Together, these concerns raise a question whether a regime founded upon professional discretion can be faithful in any true sense to its client community.

William Simon answered the discretion argument persuasively in his essay *Ethical Discretion in Lawyering*.[163] Discretion is the stock in trade of lawyering. Recognition of a community-based approach changes the lawyering process very little; it is the substance informing the discretion that changes. Lawyers are always bound by an obligation to exercise the discretion in good faith, and presumably (although empirically it is not likely) lawyers may be sub-

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YALE L.J. 1093 (1971); Hirsch, Hirsch & Margolis, *Regression Analysis of the Effects of Habitability Laws Upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098 (1975); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973).

163. Simon, *supra* note 127, at 1126–29.

jected to professional sanction for abuse of that trust. Imposition of a community obligation actually assists a lawyer in exercise of discretion because the immediate presence of a client with real needs ensures care and consideration for that plight. The needs of the unnamed or potential clients will tend to feel less immediate, and the pressures less visible. The risk of favoring the unnamed seems far lower than the risk of overlooking the unnamed when the named is sitting across from the lawyer. The ethical tendency, then, should be to encourage the protection of those who would be overlooked. It is the current system which, by tending to view the individual case as a trump, offers more worrisome discretion.

It is true that commentators have expressed considerable concern about the general specter of lawyer paternalism.[164] The fear that lawyers will attempt to influence client decisions with a view toward what is best for the client is not an illegitimate one. Nothing argued here, however, would encourage that behavior. Legal services lawyers have no ethical permission to decide what is best for their clients. They do have permission, and perhaps an obligation, to consider the values and interests of other potential clients. In this way they will adhere to a client-centered philosophy, but with an expanded definition of client.

The institutional constraint concern, the second prong of the objection to increased lawyer power, is irrelevant because it applies, if it is valid, to current legal services practice as well as to any new version of legal services practice. Lipsky's and Hasenfeld's research[165] supports the thesis that all human services organizations operate and conduct themselves less according to rules and principles, and more according to survival instincts generated by their political and economic environment. For legal services, that environment would include powerful funding sources, courts and agencies with which the lawyers must interact on a regular basis, and local political figures and entities.[166] Given these constraints on or-

164. *See, e.g.*, Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

165. M. LIPSKY, *supra* note 12; Y. HASENFELD, *supra* note 16. *See also supra* text accompanying notes 11–23.

166. The descriptions offered by Hasenfeld and Lipsky regarding human services organizations and street-level bureaucrats have been confirmed in the literature specific to legal services. *See, e.g.*, B. GARTH, *supra* note 104; J. KATZ, *supra* note 20; M. KESSLER, *supra* note 20; H. STUMPF, *supra* note 154.

ganizational functioning, how well can we trust the discretion of lawyers?

If lawyers judge their conduct by community standards rather than by individual zeal standards there will be no greater risk of client abuse. In some ways, the community obligation approach helps in this regard. First, this approach recognizes the institutional reality of legal services practice, which the individual service model fails to do. The individual model of lawyering analogizes legal services practice to private practice, an analogy that simply fails to fit. By requiring lawyers to be explicit in their decisionmaking, the proposed model arguably invites more honest and open consideration of the impact, legitimate or otherwise, of environmental factors on the office's decisions. It accepts legitimate environmental influence as a proper constraint on lawyering activity in view of future client needs, but rejects illegitimate environmental influence.[167]

In addition, the Hasenfeld and Lipsky studies showed the importance of professional ethics in counteracting environmental influences on organizational behavior.[168] Thus, while a legal services office can expect much influence from its dominant coalitions, that influence can be limited by the office's sense of professional obligation. Whether that obligation is individual-directed or community-directed does not matter, as long as it is there.[169]

2. Client Disempowerment

This objection, while in some ways merely the reverse of the first objection, is more troublesome. As Joel Handler has written, a serious objection to modern bureaucratic functioning is the lack of

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167. *See supra* notes 157–158 and accompanying text for an example of legitimate environmental influence.

168. *See* Y. HASENFELD, *supra* note 16, at 145–46, 183 (organization behavior results from values and ideology of dominant coalition, but constrained by community groups upon whom the organization depends for legitimation and support, and by the staff's needs, interests and normative ethics); M. LIPSKY, *supra* note 12, at 189–90.

169. Compare William Simon's discussion of the need to professionalize the welfare bureaucracy, to increase discretion, and to reduce the importance of rigid rules. In discussing the "trust" component of that recommendation, he writes:

> [P]ublic officials [here, the welfare department staff] can be trusted to adhere to applicable standards when they are socialized through professional training to do so, when they are active participants in a vital professional culture, when they are subject to pressure from peers to do so, when they have a duty to justify their decisions to citizens affected by them, and when they receive relatively high status and reward.

Simon, *supra* note 153, at 1242.

power that clients, and particularly dependent clients, feel in their relationships with bureaucracy.[170] The model developed here seems to deprive poor clients of some power to which they are entitled under the current regime. That fact, however, does not make the model presented entirely unworkable.

A community-based model no doubt will change the balance of articulated authority in the attorney-client relationship. It replaces a client-centered model with, at best, a partnership model.[171] While in individual cases it means less power for the client and a resultant increase in lawyer influence, this fact does not damn the endeavor.

Several considerations help justify the proposal in light of this critique. First, the proposal, if true to its aims, will enhance the rights of poor clients generally, and may increase the power of that segment of the population accordingly.[172] Second, the proposal invites and encourages dialogue between the poor and the legal services staff, during which lawyers will be expected to justify their decisions and value preferences to affected community members. Each of these dialogues may increase the role of community members in the service delivery process.[173] Further, the proposal seemingly increases dialogue between the individual client and his lawyer. If I am correct that lawyers at present make allocation decisions based on implicit or improper criteria, it follows that no open discussion occurs as to why representation might be limited. By making limitation criteria public[174] and explicit, the organization staff would be encouraged to talk about its choices. Thus, the client whose case might receive less treatment is disempowered by that decision, but his increased participation in the process might

170. Handler, *supra* note 17. Handler's views are, of course, shared by many. *See, e.g.*, Alfieri, *supra* note 84; Bellow, *supra* note 3; White, *To Learn and Teach*, *supra* note 84.

171. The partnership model was suggested, with different purposes in mind, by Failinger & May, *supra* note 6, at 45. It also formed the core of the informed consent analysis in Maute, *supra* note 61.

172. This argument is used by Marie Failinger and Larry May in rebuttal to Marshall Breger's rights-based argument against law reform lawyering. *See* Failinger & May, *supra* note 6, at 24–25.

173. I am also relying on the theory of "dialogism" for the proposition that communication translates into participation that translates into power. *See* Handler, *supra* note 17, at 1093–113; White, *To Learn and Teach*, *supra* note 84, at 758–66.

174. I assume that adoption of a community-based model would mean that clients of an office, as well as community advisory boards and other interested members of the public, would learn both that inter-client choices are made on the basis of certain criteria, and what those criteria might be. *Compare* Smurl, *supra* note 30, at 529 (arguing that any morally justified rationing system must employ public standards, to limit discretion and to expose moral considerations upon which the choices are made).

restore some sense of empowerment. If the reduction in service would have taken place anyway, through less open means, then we have lost nothing by opening the process to scrutiny.

This latter point deserves emphasis as the final consideration of the "disadvantage" of client disempowerment. In many ways the suggestions made here do not disempower clients; instead, they recognize that the legal services delivery system inherently disempowers some clients. If a community-based ethic might remove authority from the attractive or vocal client,[175] it should increase the authority of the more aptly "representative" client.

3. Abandonment

Some of the suggestions made here call for lawyers to consider at least limiting service to a client after the relationship has commenced.[176] This suggestion remains troubling, and may be the most serious obstacle to acceptance of the proposals offered here. There are both legal and moral objections to the idea of abandonment.

The lawyer-client relationship, like most relationships, involves trust and breach of that trust is occasion for moral concern. The opposition to abandonment, even if abandonment might be justified on efficiency grounds, rests on that breach of trust. A person who becomes a client thereby earns a status quite different from the person who is not a client, by virtue of that very relationship.[177] As it has been voiced in the context of medicine: "[A] physician who leaves the care of one patient to take up the care of others for the sake of efficiency is like one who has broken a solemn promise. Faith has been broken. The patient's rights have been abrogated."[178] The ethical standards, as well as professional liability principles governing lawyers, reject client abandonment.[179]

For any case in which a legal services lawyer must provide less than full representation because of the needs of other clients, the

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175. *See supra* note 126.

176. *See supra* text accompanying notes 129–131.

177. This trust relationship has been described in the medical context by Charles Fried. *See* G.R. WINSLOW, *supra* note 33, at 75–76, 99 (discussing Fried's theories). *See also* Fried, *supra* note 133 (legal context).

178. G.R. WINSLOW, *supra* note 33, at 75 (summarizing the position of Fried).

179. The withdrawal rules of both the Model Code and the Model Rules prohibit termination of a relationship without assurance of client protection (*see* MODEL RULES *supra* note 63, Rule 1.16(d); MODEL CODE, *supra* note 53, DR 2-110(A)(2)), and prohibit client neglect (MODEL RULES Rules 1.1, 1.3; MODEL CODE DR 6-101(A)(3)). Failure to comply with these provisions, or with their substance, may create liability toward an injured client. *See* C. WOLFRAM, *supra* note 63, §§ 5.1, 9.5.3.

abandonment objection will apply. It does not follow, however, that the objection will prevail. Because abandonment is not only a moral concern but a strong personal concern as well, any decision to limit an existing client's representation probably will occur only in the face of substantial justification. Further, since most of the triage decisions discussed here involved choices among existing clients, the abandonment objection seems entirely inapposite in those cases. A relationship will exist with each client, and if some choice must be made, it is inevitable that some client will feel, and be, abandoned.

Two further factors tend to minimize the impact of this concern. One is that in few cases will clients simply be sent away. What is more likely is a selected neglect or limitation of service for cases which are less urgent. Abandonment is a concern there, of course, but obviously less so than in the withdrawal situation.[180] Also, the way in which the relationship is introduced will affect considerably the perception of breach of trust. Clients who are told of the need to ration resources and the possibility of rearranging priorities in the future will have less cause to feel that their rights have been violated.[181]

Finally, there is some authority that legal services lawyers, because they are the only lawyers available, may have to sacrifice existing clients if the needs of a potential client are urgent and serious enough. Responding to an inquiry about the responsibilities of legal services offices in the wake of severe budget cutbacks, a 1981 ABA Formal Opinion offered the following advice:

> The legal profession has long recognized the general duty owed to persons unable to afford legal counsel. When indigent clients would go unrepresented, there is added justification for accepting

180. It may be true that clients will feel less abandoned if the reasons for the limitation are explained. Of course, an argument can be made that the precise opposite would be true. I suspect that clients are abandoned in existing practice but nobody has permission to admit it. *See* Lewis, *Shaffer's Suffering Client, Freedman's Suffering Lawyer*, 38 CATH. U.L. REV. 129, 131 (1988) (proposal that a lawyer ought to warn her client in advance that the lawyer may have to disagree with a client's choice on moral grounds, with the warning intended to minimize the client's suffering if he is sent away for that reason). *But see* Shaffer, *Less Suffering When You're Warned: A Response to Professor Lewis*, 38 CATH. U.L. REV. 871, 875–79 (1989) (arguing that a warning has several serious disadvantages, particularly if the act warned of is unlikely to occur).

181. From a legal standpoint, both physicians and lawyers may limit the scope of their involvement at the outset of the relationship, and avoid liability for ceasing treatment or service once the original, limited goals have been accomplished. *See, e.g.*, MODEL RULES, *supra* note 63, Rule 1.2(d) (lawyers); 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 239 (1981) (physicians).

> new clients even at the risk of future disruption of the legal services. . . .
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> . . . .
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> . . . [E]xtreme cases may arise, such as a petition for court-ordered sterilization of an indigent woman, that would justify occasional acceptance of a new client [after the office has closed intake] even if existing clients with less urgent problems could possibly suffer as a consequence. If immediate legal services are required to avoid irreparable harm, and if no other lawyer can be found to represent the client, acceptance of the new matter is proper.[182]

This Opinion was limited to the most dire circumstances—when funding was cut back or about to end. Nevertheless, if the principle is valid under that extreme circumstance, it must also apply to equivalent emergencies which occur during ordinary, quotidian budget crises.

Abandonment remains a powerful moral critique as applied to legal services triaging processes. It will be, and should be, very difficult to turn away from those whom the lawyer and her institution have promised to help. But as a moral concern it deserves to be weighed alongside competing moral concerns, including those for the suffering of other persons in need. One should not trump the other.

CONCLUSION

A neighborhood legal services office is an odd institution. Its members are committed at once to a community of interests, and to the individual interests of those who walk through the doors. It respects the autonomy and decisionmaking authority of each of its clients, and aims to provide those clients with the best representation possible, but at the same time it looks to conserve its resources so as many as possible may benefit from them.

The professional responsibility advice that guides the staff of a legal services office tends to elide the contradictions inherent in this practice. That advice traditionally follows a private practice model, and encourages or mandates individual zeal and commitment. That advice is not satisfactory. Legal services attorneys ought to, and will, remain committed to principles of zeal and commitment to individual clients, and these principles should remain an important element in a governing ethic of poverty law practice. But there is

182. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981).

danger and risk in adherence to a private practice model in a subsidized setting.

The proposal presented here seeks to include a community obligation in that ethic. It seeks to recognize that the zeal and commitment of a legal services lawyer are owed not only to her individual clients, but to others as well. If conflicts arise between those obligations, the lawyer must be permitted to consider both in her attempt at resolution. If decisions must be made between her clients, she must be permitted a principled manner by which to decide. The community-based model offered here is a beginning attempt to craft professional responsibility principles that recognize and accept the uniqueness of legal services practice.